

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ROCKET
NUMBER

144

U.S. DISTRICT COURT
WEST DIST. OF WISCONSIN

NEIL GAIMAN and MARVELS AND
MIRACLES, LLC,

Plaintiffs,

v.

TODD McFARLANE, TODD
McFARLANE PRODUCTIONS, INC.,
TMP INTERNATIONAL, INC., and
McFARLANE WORLDWIDE, INC.

Defendants-Counterclaimants,

And

IMAGE COMICS, INC.,

Defendant.

U.S. DISTRICT COURT
WEST DIST. OF WISCONSIN
NOV 20 2002 JC
GINO J. AGNELLO
CLERK

SEP 20 2002

FILED/RECEIVED
JOSEPH W. SKUPNIEWITZ, CLERK
CASE
NUMBER

Case No. 02-C-0048-S

03-1461

AFFIDAVIT OF GABRIEL S. GROSS

STATE OF WISCONSIN)
) SS.
COUNTY OF DANE)



03-1461-L11

After being first duly sworn, Gabriel S. Gross deposes and states as follows:

1. I am one of the attorneys for the McFarlane Defendants and make this Affidavit upon personal knowledge.
2. Attached as Exhibit A is a true and correct copy of Defendants' Trial Exhibit No. 588, a printed copy of material contained on Plaintiff Neil Gaiman's web site, www.neilgaiman.com.

3. Attached as Exhibit B is a true and correct copy of the transcript from the September 17, 2002 deposition of Plaintiffs' expert James P. Caven.

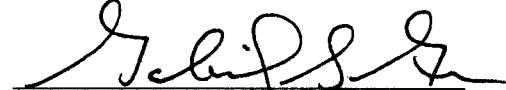
4. Attached as Exhibit C is a true and correct copy of Defendants' Trial Exhibit No. 314, a copy of the script for *Spawn* Issue 9.

5. Attached as Exhibit D is a true and correct copy of Plaintiffs' Trial Exhibit No. 3/Defendants' Trial Exhibit No. 350, a copy of a July 15, 1997 letter from Gaiman to McFarlane.

6. Attached as Exhibit E is a true and correct copy of Plaintiffs' Trial Exhibit No. 4/Defendants' Trial Exhibit No. 351, a copy of a July 15, 1997 letter from McFarlane to Gaiman.

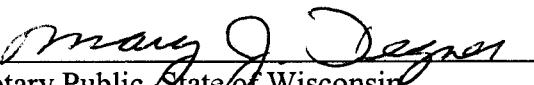
7. Attached as Exhibit F is a true and correct copy of Plaintiffs' Trial Exhibit No. 5/Defendants' Trial Exhibit No. 364, a copy of a second July 15, 1997 letter from McFarlane to Gaiman.

Dated this 20th day of September, 2002.



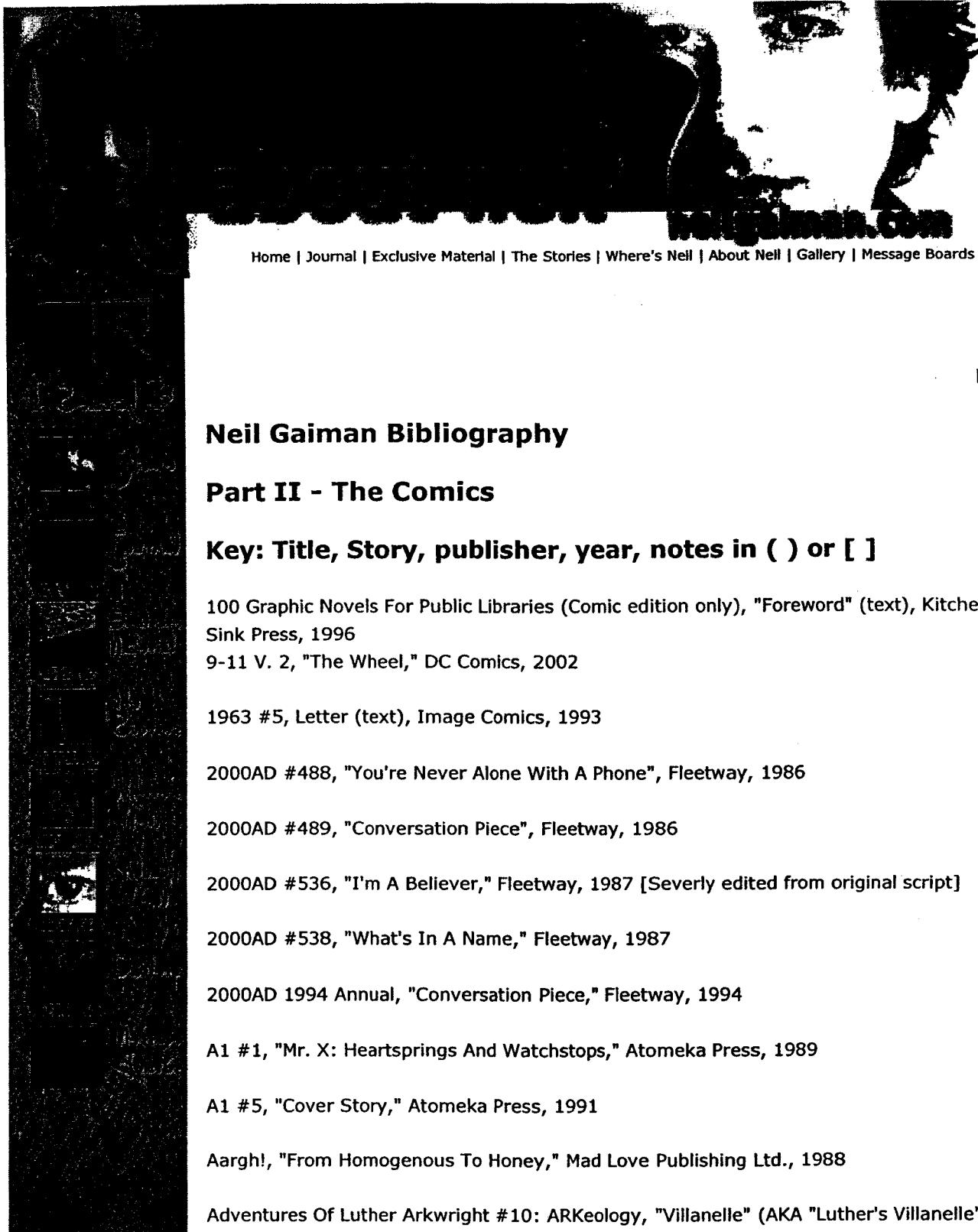
Gabriel S. Gross

Signed and sworn to before me this
20th day of September, 2002.



Notary Public, State of Wisconsin
My Commission expires Aug. 21, 2005

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Soloman Kane Sketchbook, "Foreword" (text), Wandering Star, 1997
Sonovawitch, "Introduction" (text), Exhibit A Press, 2000
Spawn #9, "Angela," Image Comics, 1993
Spawn #26, "The Dark," Image Comics, 1994 [Uncredited writer of 'partial script']
Spawn Collection V. 2, "Angela," Image Comics, 1996
Spawn Collection V. 6, "The Dark," Image Comics, 1998 [Uncredited writer of 'partial script']
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Swamp Thing V. 4, "Trifles Light As Air And Otherwise" (text), Titan Books, 1987
Swamp Thing V. 5, "Growing Pains" (text, credited as "Gerry Musgrave," one of the pseudonyms Neil is listed as having in a 1986 story), Titan Books, 1988
Swamp Thing V. 8 , "How Do You Baffle A Vegetable? And Other God Jokes" (text), "Hom Free" (Alan Moore used a few lines from Neil's first, and still unpublished, comics script 'The Day My Pad Went Mad'), Titan Books, 1988
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Tundra Publishing Inc., 1992
Taboo #4, "Babycakes," SpiderBaby Grafix & Publications, 1990
Taboo #6, "Blood Monster," "Holly's Story" (comic written by Neil's second child, Holly Gaiman), Tundra Publishing Ltd., 1992
Taboo #7, "Sweeney Todd, The Demon Barber Of Fleet Street: Prologue," Tundra Publishing Ltd., 1992
Tale Of One Bad Rat #1, "Introduction" (text), Dark Horse Comics, 1994
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Tekno: The Official Tekno Comix Handbook, "--" (text about Lady Justice), Tekno Comix, 1996
Time Twisters #17, "Conversation Piece" (colorized), "You're Never Alone With A Phone!" (colorized), Quality Comics, 1988/9
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Total Eclipse #4, "Screaming," Eclipse Comics, 1989
Trident #1, "Light Brigade Chapter One: The Path Of The Just" (credited as cowriter), "Light Brigade Chapter Two: Take Five" (credited as sole writer), Trident Comics, 1989
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Vertigo Jam #1, "The Castle," DC Comics (Vertigo), 1993
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Vogarth #20 (AKA V. 2 #1), "An Honest Answer," Vogarth Comix, 1994
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Who's Who In The DC Universe #8, "Death" (uncredited writer), DC Comics, 1991
WIIndows #16, "Villanelle" (AKA "Luther's Villanelle") (version C), Cult Press, 1994
WIIndows #21, "An Honest Answer," , Cult Press, 1994
The Worm, "What This Book Is Really About" (text), Slab-O-Concrete Publications, 1999

Upcoming: Murder Mysteries (adaptation of text story), Endless Nights (new Sandman/Endless tales), 1602 (from Marvel), Hellraiser collection (reprinting "Wordsworth")

Unfinished: Sweeney Todd, Miracleman

Consultant: Neil is listed as consultant on many of his spin off books (such as the Dreaming and Books of Magic)

Other: Neil also created the characters used in several Tekno Comics titles, such as Lady Justice and Mr. Hero, but did not actively work on the series. Neil has also been used as character in other peoples stories. Here are a few notable appearances:

*Eddie Campbell's Bacchus # 4-8, 14, 16, 44, 49, 52, as a character and also in true anecdotes

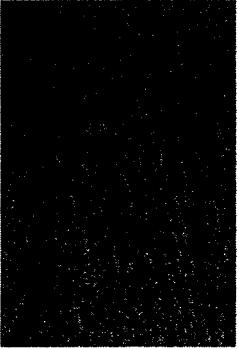
*Donna Mia #1-2 as a main character

*Rare Bit Fiends #3-5, 7, 10, 13, as he appeared in Rick Veitch's dreams

*Star Child #4, 6, 10, Negative Burn #8, 50 has "Lil Neil"

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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF WISCONSIN

3 =====

4 NEIL GAIMAN, a resident of Wisconsin,
5 and MARVELS AND MIRACLES, LLC,
6 a Wisconsin Limited Liability Company,

7 Plaintiffs,

8 vs.

9 Case No. 02-C-0048-S

10 TODD McFARLANE, a resident of Arizona,
11 TODD McFARLANE PRODUCTIONS, INC.,
12 an Arizona corporation,
13 TMP INTERNATIONAL, INC.,
14 a Michigan corporation,
15 McFARLANE WORLDWIDE, INC.,
16 a Michigan corporation,
17 and IMAGE COMICS, INC.,
18 a California corporation,

19 Defendants.

20 =====

21 Deposition of:

22 JAMES P. CAVEN

23 =====

24 Date: Tuesday, September 17, 2002

25 Time: 10:15 o'clock a.m.

Reported by NANCY L. DELANEY

PROFESSIONAL REPORTERS
L I M I T E D

Deposition of JAMES P. CAVEN 9-17-02

1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE WESTERN DISTRICT OF WISCONSIN
 3 =====
 4 NEIL GAIMAN, a resident of Wisconsin,
 5 and MARVELS AND MIRACLES, LLC,
 6 a Wisconsin Limited Liability Company,
 7 Plaintiffs,
 8 vs. Case No. 02-C-0048-S
 9 TODD McFARLANE, a resident of Arizona,
 10 TODD McFARLANE PRODUCTIONS, INC.,
 11 an Arizona corporation,
 12 TMP INTERNATIONAL, INC.,
 13 a Michigan corporation,
 14 McFARLANE WORLDWIDE, INC.,
 15 a Michigan corporation,
 16 and IMAGE COMICS, INC.,
 17 a California corporation,
 18 Defendants.
 19 =====
 20 Deposition of:
 21 JAMES P. CAVEN
 22 =====
 23 Date: Tuesday, September 17, 2002
 24 Time: 10:15 o'clock a.m.
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1 EXHIBIT INDEX
 2 203 Expert witness report of James P. Caven 7
 3 dated September 11, 2002
 4 204 Schedules to expert witness reports of 7
 5 James P. Caven
 6 205 Supplemental expert witness report of 8
 7 James P. Caven dated September 13, 2002
 8 206 Royalty agreement dated December 12, 1996 133
 9 207 Letter to Neil Gaiman dated December 14, 1993 from Big Entertainment, Inc.
 10 EXAMINATION INDEX
 11 JAMES P. CAVEN BY MR. SALSICH. 3
 12 BY MR. FELDMANN 190
 13 =====
 14 JAMES P. CAVEN,
 15 called as a witness, after being first
 16 duly sworn in the above cause, testified
 17 under oath as follows:
 18 EXAMINATION
 19 BY MR. SALSICH:
 20 Q Would you state your name for the record, please.
 21 A James P. Caven.
 22 Q And Mr. Caven, you have been asked to prepare an
 23 expert witness report and provide expert witness
 24 testimony by the plaintiffs Neil Gaiman and Marvels

1 DEPOSITION of JAMES P. CAVEN,
 2 a witness of lawful age, taken on behalf of the
 3 defendants in the above-entitled cause, wherein NEIL
 4 GAIMAN, et al., are the plaintiffs and TODD McFARLANE, et
 5 al., are the defendants, pending in the District Court of
 6 the United States for the Western District of Wisconsin,
 7 pursuant to stipulation, before NANCY L. DELANEY, a
 8 Notary Public in and for the State of Wisconsin, at the
 9 offices of LaFollette, Godfrey & Kahn, Attorneys at Law,
 10 One East Main Street, Madison, Wisconsin, on September
 11 17, 2002, commencing at 10:15 o'clock a.m.
 12 APPEARANCES
 13 JOAN L. EADS and JEFFREY A. SIMMONS,
 14 FOLEY & LARDNER, Attorneys at Law
 15 150 East Gilman Street, Madison, Wisconsin
 16 appearing on behalf of the plaintiffs;
 17 PETE SALSICH, III, (by telephone)
 18 BLACKWELL, SANDERS, PEPER, MARTIN, LLP,
 19 Attorneys at Law, 720 Olive Street,
 20 Suite 2400, St. Louis, Missouri,
 21 appearing on behalf of the defendants;
 22 EUGENIA G. CARTER and TODD G. SMITH,
 23 LAFOLLETTE, GODFREY & KAHN,
 24 Attorneys at Law, One East Main Street,
 25 Madison, Wisconsin, also appearing on
 behalf of the defendants;
 R. SCOTT FELDMANN, (by telephone)
 BROBECK, PHLEGER & HARRISON, LLP,
 Attorneys at Law, 38 Technology Drive,
 Irvine, California, appearing on behalf of
 the defendants, Image Comics, Inc.
 ALSO PRESENT: THOMAS R. KLINGELE

2 And Miracles, LLC in this case, is that correct?
 3 A Yes.
 4 Q Do you have a doctoral degree of any type?
 5 A No doctoral degree.
 6 Q So if I call you Mr. Caven, is that okay?
 7 A That is correct.
 8 Q Have you ever been -- have you ever testified before?
 9 A Yes.
 10 Q And have you ever given your deposition before?
 11 A Yes.
 12 Q So you recall that we're going to proceed with a
 13 question and answer process this morning and this
 14 afternoon. I will do the best I can to wait until you
 15 have finished your answer, if you will do the best
 16 that you can to wait until I finish my question, is
 17 that fair?
 18 A That's fair.
 19 Q And we should note for the record that we have several
 20 attorneys, myself included, participating in this
 21 deposition via telephone conference call and so we'll
 22 not have eye contact or be able to see nods and things
 23 like that, so it's going to be very important for us
 24 to be clear in our questions and our answers, is that
 25 all right?
 A Fair enough.

Deposition of JAMES P. CAVEN 9-17-02

	5		7
1 Q Great. And you're doing a good job so far, but for 2 the same reasons I just mentioned, we need to make 3 sure that we have yes and no answers or a clearly 4 stated answer, rather than uh-huh and uh-uh, is that 5 all right?		1 anticipate, other than preparing for trial and reading 2 Mr. Klingele's report and rebutting anything necessary 3 within the context of his analysis and conclusions.	
6 A That's correct.		4 Q Anything else besides -- and I realize that's not -- 5 that was a general list of tasks that you still have 6 to complete, are there any other general areas that 7 you intend to continue working on?	
7 Q Great, thank you very much. If at any time you don't 8 understand a question that I've asked, please correct 9 me or ask me to clarify that. Will you do that?		8 A Not at this time. (Exhibit 203 is marked for identification)	
10 A Yes.		9 Q You have prepared an expert witness report as well as 11 a supplemental expert witness report that the 12 plaintiffs' lawyers have provided us, and we have 13 marked those for identification purposes today as 14 deposition Exhibits 203 and 205. 15 In addition, we've also received a set of 16 schedules that are identified in your expert witness 17 report, and it is my understanding they fully detail 18 the calculations you've made and that you identified 19 in your report and that's been marked as deposition 20 Exhibit 204.	
16 Q Thanks. Are you being paid for your services?		21 (Exhibit 204 is marked for identification) 22 I'd like to ask you generally, you just testified 23 that you have some additional work you may need to do 24 in reviewing depositions and you may still be 25 preparing some additional exhibits. I want to	
17 A Yes.			
18 Q How much?			
19 A My hourly rate today is \$295 an hour. I have other 20 staff people that have worked on this engagement, so 21 it's a blended rate that we're charging.			
22 Q And what is that blended rate?			
23 A It's probably averaging out to about \$200 an hour.			
24 Q And do you get paid a different rate for giving a 25 deposition than simply for preparing your report?			
	6		
1 A No, it's always the same rate.		1 understand how much we can rely on the reports that 2 you already provided us as a complete as possible 3 statement of your opinions that you intend to give at 4 the trial in this case.	
2 Q And would that be true for testifying at trial?		5 (Exhibit 205 is marked for identification)	
3 A Yes.		6 A The change of exhibits may only be not in content, but 7 in format only, just so that they're in presentation 8 form, either larger print for the jury, so the content 9 I don't anticipate changing, other than the caveat 10 that upon reading any of the depositions, things that 11 I've learned through conversations with counsel 12 regarding those depositions may change, but my 13 understanding of those depositions and their contents 14 is what I have relied on within the context of 15 preparing my report.	
4 Q Have you been asked to testify at the trial of this 5 case?		16 Q And what depositions are you still waiting to read 17 that have already taken place?	
6 A Yes.		18 A I was handed a stack recently, but I think if I can 19 remember all the names, Terri Cunningham, I think, 20 there's a Mr. Levitz, I think there is a 21 Mr. Valentino, Alan Inglis, I-n-g-l-i-s, I'd have to 22 kind of review my notes. I was given about a 23 four-inch stack of depositions and I don't recall all 24 the parties there, but those are the ones that come to 25 mind off the top of my head.	
7 Q And are you preparing to do so?			
8 A Yes.			
9 Q How many hours have you worked so far on this case?			
10 A I think we've probably logged in about 250 hours.			
11 Q And that's you along with the staff people that you 12 referred to?			
13 A Yes.			
14 Q Have you sent any bills or invoices to the plaintiffs 15 yet?			
16 A We sent one bill and we received a retainer payment 17 pursuant to our engagement letter.			
18 Q Do you plan on doing any more work after today?			
19 A There is some additional reading of depositions that I 20 have not completed. There are additional exhibits 21 that I may prepare for trial.			
22 There are additional framework discussions that 23 may account for the accounting of Medieval Spawn and 24 Cogliostro, post August 4th, but we have not discussed 25 that further. Those are the only things that I			

Deposition of JAMES		P. CAVEN 9-17-02
		9
1 Q Okay. With respect to -- well, let me just take 2 this -- we'll break it down. Leaving aside those 3 depositions that you have not read, did you read the 4 deposition transcript of Todd McFarlane's deposition?		11
5 A Yes.		
6 Q Have you read the deposition transcript from Neil 7 Gaiman's deposition?		1
8 A No, that's also in the stack.		2
9 Q Have you had any discussions with Mr. Gaiman?		3
10 A Yes.		4
11 Q Have you had any discussions with Mr. Gaiman since you 12 wrote your expert witness report that we've marked as 13 Exhibit 203?		5
14 A Yes.		6
15 Q Has Mr. Gaiman reviewed your expert witness report 16 that's been marked as Exhibit 203?		7
17 A I can't answer that.		8
18 Q Did you have any discussions with Mr. Gaiman about the 19 conclusions and calculations contained in Exhibit 20 203?		9
21 MS. EADS: Objection as to form. 22 Are you talking about subsequent to the report or 23 before the report?		10
24 Q At any time.		11
25 A It's such a broad question, could you be more		12
1 specific?	10	1 A No.
2 Q Sure. When you were preparing your expert witness 3 report, Exhibit 203, during the time you were 4 preparing it and prior to the time it was provided to 5 us by plaintiffs' attorneys, during that time, did you 6 have any conversations with Mr. Gaiman about the 7 specific calculations or conclusions that are 8 contained in that report?	11	2 Q I'd like you to take a look -- do you have a copy of 3 your expert witness report, Exhibit 203, that you can 4 work from?
9 A Yes.	12	5 A Yes.
10 Q I'm going to ask you, we will go through that fairly 11 detailed along with the schedules, so I may ask you to 12 point out at what point in time Mr. Gaiman may have 13 been the source of your information, so we'll take 14 those up as they come.	13	6 Q I'd like to work through that now and just start by 7 asking you some general questions. First of all, I'd 8 like to ask you to list for me, and I'm going to write 9 them down, the specific opinions that you intend to 10 offer at the trial in this case on behalf of the 11 plaintiffs, and if you need to do so, please point to 12 me in either your original report, Exhibit 203, or 13 your supplemental report, Exhibit 205, where I can see 14 that opinion.
15 You also prepared recently a supplemental expert 16 witness report which we've marked as Exhibit 205, do 17 you see that?	15	15 MS. EADS: Object as to form.
18 A Sorry, there's been a slight interruption here.	16	16 You're going to have to rephrase that question,
19 MS. CARTER: Why don't you 20 continue? I need to get a couple more copies, 21 unless you can work from his.	17	17 Counsel. His opinions are contained in both
22 MS. EADS: Why don't you get them.	18	18 Exhibit 203 and 205 and the question, the way you
23 MS. CARTER: Pete, will you hold 24 up, please. They'll bring them in. Maybe we can 25 continue and you can look on.	19	19 framed it, is almost impossible to answer.
	20	20 Q Did you understand my question, Mr. Caven?
	21	21 A Well, it's awfully broad.
	22	22 Q Well, we'll start broad and work our way down. I
	23	23 simply want you to list for me one through two, one
	24	24 through ten, one through 20, the opinions you intend
	25	25 to offer at trial.

Deposition of JAMES P. CAVEN 9-17-02

	13	MS. EADS: I'll renew my objection.	15
1		MR. SALSICH: That's fine.	
2		Q What's your first opinion that you're going to offer	
3		in this trial, Mr. Caven?	
4		A I mean, this is a broad question, but if you turn to	
5		page 4 of 15 under toys and that carries also onto	
6		page 5, that the calculations for toys that Todd	
7		McFarlane Productions received from TMP International	
8		were at a rate of five percent of net revenues.	
9		The document that we were provided for the	
10		royalty agreement by both companies stipulates a	
11		royalty rate at 100 percent of gross sales, not net	
12		sales.	
13		Q So what is your opinion there?	
14		A My opinion is that the information that both companies	
15		were working off of is understated, but we have not	
16		been able to obtain the gross sales information due to	
17		accounting system problems, changeovers. Those are	
18		actually observations and conclusions I reached on	
19		that issue.	
20		Q Are you making a conclusion and offering an opinion as	
21		to the accuracy of the royalties paid by Todd	
22		McFarlane Productions in August of 1997 on toys?	
23		MS. EADS: Objection as to form.	
24		Q You may answer.	
25			
	14	A Can you restate the question?	16
1		Q Well, you know, I'm trying to find out what you're	
2		going to say to the jury. Specifically, is it your	
3		statement that the royalties calculated for toys by	
4		Todd McFarlane Productions in August of 1997 was	
5		accurate or inaccurate?	
6		MS. EADS: Objection as to form.	
7		Counsel, what this witness is going to say to the	
8		jury is essentially contained in these reports and	
9		if you want him to read the reports in word for	
10		word, he'll be happy to do that. Otherwise,	
11		you're going to need to be very specific in your	
12		questions.	
13		MR. SALSICH: Let's go off the	
14		record, please.	
15		(Discussion off the record)	
16		MS. CARTER: Okay. We have the	
17		witness back, Pete.	
18		MR. SALSICH: Okay, let's go back	
19		on the record.	
20		Q Mr. Caven, are you represented by counsel here today?	
21		A Yes.	
22		Q Who's your lawyer?	
23		A Joan Eads.	
24		Q Is she your individual counsel today?	
25			

MS. EADS: Objection as to form.

Deposition of JAMES P. CAVEN 9-17-02

	17		19
1 Q You may answer.		1 A "In our review of certain financial documents or	
2 A Only to the extent that as you've stated, new		2 schedules produced by the defendants, royalties paid	
3 information such as the defendants' report or other		3 to Todd McFarlane Productions from TMP International,	
4 information necessary to rebut that report. I do not		4 Inc. were paid at a raid of five percent of certain	
5 anticipate changing the documents of 203, 204 or 205,		5 net revenues (TM00489). The calculation of royalties	
6 but if there is additional information that comes to		6 due Todd McFarlane Productions from TMP International	
7 light upon reviewing of depositions or other matters,		7 did not appear to be in compliance with the royalty	
8 I will notify you of those changes.		8 agreement provided by McFarlane (TM01237-01248) which	
9 Q I understand that and I think we're pretty clear on		9 stipulates a royalty rate of, 'Five percent of 100	
10 that, but my question is a little bit different than		10 percent of all gross sales by licensee.'"	
11 that. I'm not asking about changes to the opinions		11 Q And I understand those two sentences. My question for	
12 that are already contained in 203, 204 or 205, I'm		12 you is this, and I believe this was the question I was	
13 asking about whether there are any additional,		13 trying to ask you before, are you stating when you say	
14 substantively different opinions that you are aware of		14 those two sentences that you are going to offer an	
15 now or that you intend to offer at trial that are not		15 opinion that the calculation that appears on TM00489	
16 contained in any way in 203, 204 or 205.		16 and is reflected in the royalties ultimately paid to	
17 MS. EADS: Objection as to form.		17 Neil Gaiman in August of 1997 for toys was incorrect	
18 Q You may answer.		18 in some way?	
19 A There are no additional tasks that I'm requested to		19 A Yes, based upon my interpretation of TM01237 to 01248.	
20 provide an additional opinion on that would not be		20 Q And is it your statement that the manner in which the	
21 part of this framework that is contained in 203, 204		21 royalties paid to Neil Gaiman in August of 1997 on	
22 or 205, absent any other information that is provided		22 toys, the manner in which those royalties were	
23 regarding damages.		23 incorrectly calculated was that the pool upon which	
24 Q I understand, okay. We can work from these documents,		24 those royalties were calculated was too small, because	
25 thank you. Now, a few minutes ago we were talking		25 it was based on TMP International's net revenues,	
	18		20
1 about your first opinion and you pointed me to page 5		1 rather than 100 percent of TMP International's gross	
2 of Exhibit 203, and you said, if I understood		2 sales?	
3 correctly, that in general terms, it appeared that		3 MS. EADS: Objection as to form.	
4 Todd McFarlane Productions was paying some royalties		4 Q You may answer.	
5 or stating that it had received royalties from TMP		5 THE WITNESS: Can you read back the	
6 International at a rate of five percent of net		6 question.	
7 revenues and you said something about it should have		7 (Reporter reads back previous question)	
8 been 100 percent of gross sales. Do you recall our		8 A That is one of the opinions I will hold on that issue.	
9 discussion about that?		9 Q Any other opinions on that issue that you intend to	
10 MS. EADS: Objection as to form.		10 state?	
11 Q You may answer.		11 A That the royalty rate between the companies could be	
12 A Yes, I do recall, in general, the discussion we had.		12 manipulated to an understated value as evidenced by	
13 Q I'd like to clear up that rather confused discussion		13 the Capcom, that's C-a-p-c-o-m, contract or the 989	
14 we had and let's just start with -- if you would point		14 Studios royalty statement, in which it shows that TMP	
15 to me where on page 5 of Exhibit 203 the substance of		15 received a nine percent royalty as well as an 11	
16 this opinion is contained.		16 percent royalty.	
17 A In the first full paragraph on page 5.		17 Q So I understand what you just said, you said -- and I	
18 Q That starts with the words, "In our review of certain		18 was writing this down and I'm going to try to do this	
19 financial documents"?		19 today as accurately as I can, Mr. Caven, but if I do	
20 A Yes.		20 it incorrectly, you'll catch me here. I do not	
21 Q I read what appears to be two sentences in the first		21 want -- I'm not trying to trick you in any way.	
22 seven lines of that paragraph, could you read to me		22 I wrote down that you said the royalty rate	
23 those two sentences and tell me if that contains your		23 between the companies could be manipulated to an	
24 opinion on this matter? If you can read those into		24 understated value, is that correct?	
25 the record, please.		25 A Correct.	

Deposition of JAMES P. CAVEN 9-17-02

1 Q I'd like you to explain that to me first by telling me
 2 what you are referring to when you say the royalty
 3 rate between the companies.
 4 A Well, TMP International pays a royalty or a licensing
 5 for selling toys with characters that have been the
 6 rights to Todd McFarlane Productions. Both companies
 7 are owned, it is my understanding, 100 percent by Todd
 8 McFarlane. When you have related enterprises, there's
 9 not an arm's length negotiation to pay profits between
 10 related businesses.

11 And we asked for evidence of other royalties that
 12 had gone to other parties and were provided the Capcom
 13 and the 989 Studios royalty statements which evidenced
 14 that there was a higher royalty paid. Therefore, we
 15 concluded that it is possible that the characters for
 16 toys could be understated and the royalty could be in
 17 the ten percent range as opposed to the five percent
 18 range.

19 Q Anything else?

20 A Are you referring to other opinions on this issue?

21 Q I just want to make sure I understand just this one
 22 opinion. Sticking to this one opinion, I understand
 23 you gave me a lengthy explanation. I want to ask,
 24 basically, are you finished with your explanation of
 25 how you arrived at a ten percent royalty instead of a

1 five percent royalty between Todd McFarlane
 2 Productions and TMP International?

3 MS. EADS: Objection as to form, is
 4 that a question?

5 Q No, actually it wasn't, good point. It was just a
 6 statement. I want to make sure I understand your
 7 entire rationale for the conclusion that you just made
 8 and maybe we can do it this way, let me see if I can
 9 break it down.

10 Am I correct in characterizing your opinion, your
 11 second opinion in this matter that the royalty rate
 12 between Todd McFarlane Productions and TMP
 13 International, Inc. with respect to toys made by TMP
 14 International on Spawn characters should have been ten
 15 percent to TMP, rather than five percent, is that your
 16 opinion?

17 MS. EADS: Objection as to form.

18 You can answer. Do you need it read back?

19 THE WITNESS: Please read it back.

20 (Reporter reads back previous question)

21 A That is my opinion, that that's the upper range that
 22 one could determine as a royalty rate between the
 23 enterprises.

24 Q So that is the upper range that one could determine,
 25 would you agree with me that there might be other

21

1 percentage rates that one could determine within a
 2 range between five percent and ten percent?

3 A There's -- under that hypothetical, yes, there's a
 4 possibility that it could be between five and ten, but
 5 these are based on net sales, not on gross sales, so
 6 you'd have to take that into consideration.

7 Q So let me see if I understand that. When you say
 8 these are based on net sales, what are you referring
 9 to?

10 A Well, the calculations we did on a five percent and
 11 a ten percent calculation were done on net sales,
 12 because that's all the information we had, not on
 13 gross sales.

14 Q But how did that affect the range, the choice of a
 15 percentage between five percent and ten percent in a
 16 range?

17 A Well, ten percent of \$8 is different than ten percent
 18 of \$10, with \$8 being the net sales and \$10 being the
 19 gross sales.

20 Q Okay, I understand that, but that doesn't tell me why
 21 ten percent is appropriate instead of nine percent or
 22 eight percent or seven percent.

23 A Seven percent may be of gross sales, but it may equate
 24 to ten percent of net sales. They may be the same
 25 number.

22

1 Q I think we're getting a little afield here, Mr. Caven,
 2 and let's focus back on what you've already told me.
 3 You've told me that your first opinion is that there
 4 was an incorrect calculation of royalties paid to
 5 Mr. Gaiman in August of '97 for toys, because it
 6 appeared that Todd McFarlane Productions calculated
 7 its royalty payments based on net revenues of TMP
 8 International rather than gross sales, is that
 9 correct?

10 A Yes.

11 Q So I understand that there's a -- and that's one of
 12 the ways that that royalty payment was incorrect and I
 13 understand that there's a -- that your first opinion
 14 is that it should have been calculated on gross
 15 sales. I'm asking now about your second opinion, that
 16 five percent was incorrect and ten percent is the
 17 upper range that one could determine, as you said,
 18 that's what I'm talking about now and let me ask you
 19 this question with respect to that discussion.

20 Is it your opinion that the license agreement
 21 identified with document TM01237 which you identified
 22 in your report as requiring a payment of five percent
 23 of 100 percent of all gross sales, is that license
 24 agreement incorrectly negotiated, in other words, that
 25 five percent of gross sales, is that incorrect in some

23

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	25		27
1 fashion?		1 statements, as I discussed earlier, the Capcom and the	
2 MS. EADS: Objection as to form.		2 989 Studios royalties appeared to be at a nine percent	
3 Q You may answer.		3 and 11 percent rate, which is higher than the five	
4 A I'm not sure I completely understand the question.		4 percent rate.	
5 Q Well, let me ask you this, you've just told us that		5 Q Do you know if the Capcom and the 989 agreements to	
6 you think the five percent royalty figure between TMP		6 which you just referred, whether the royalty rate was	
7 and TMP International was, I believe you said,		7 calculated on the basis of 100 percent of gross sales	
8 manipulated to an understated value, do you recall		8 or some other measure?	
9 that?		9 A Without reviewing it again at this particular moment,	
10 MS. EADS: Objection as to form.		10 I would have to defer to the document.	
11 Q You may answer.		11 MR. SALSICH: Gina, do we have a	
12 A I think what I said was that there could be a		12 copy of the license agreement between Capcom and	
13 manipulation between the companies to manipulate the		13 Todd McFarlane Productions? It's Deposition	
14 profits between both enterprises, since they are owned		14 Exhibit 84, it should be in that group of	
15 by the same person.		15 documents that Matt assembled, TM01255, do you see	
16 Q Were you provided -- let me ask you this, were you		16 that?	
17 provided any documents in your work on this case to		17 MS. CARTER: Isn't it 1257?	
18 give you any indication that the royalty agreements		18 MR. SALSICH: That's the third page	
19 between TMP International and Todd McFarlane		19 of it.	
20 Productions was not the result of an arm's length		20 MS. CARTER: Yes, we have it.	
21 negotiation?		21 MR. SALSICH: Would you show that,	
22 MS. EADS: Objection as to form.		22 please, to Mr. Caven.	
23 Q You may answer.		23 MS. CARTER: It's marked Exhibit	
24 A Are you referring to someone else's formal opinion		24 84?	
25 that it's an understated --		25 MR. SALSICH: That's correct,	
	26		28
1 Q No, that's not my question.		1 previously marked in a deposition as Exhibit 84.	
2 A Well, I don't understand your question then.		2 MS. CARTER: Okay, he's got it in	
3 Q We may be here a while. I'm going to do the best I		3 front of him.	
4 can to try to ask clear questions. I thought that was		4 Q Would you turn to the third page of that agreement,	
5 clear. Let me try again. You stated, and we can read		5 it's TM01257, do you see that?	
6 back your testimony if you want, but you stated that		6 A Correct.	
7 these related enterprises, and I'm referring to Todd		7 Q And I believe that in fact is the very page that you	
8 McFarlane Productions and TMP International which are		8 cited on page 5 of your report, is that correct?	
9 both owned by Todd McFarlane the individual, I believe		9 A Correct.	
10 you stated that therefore it was not an arm's length		10 Q And do you see the royalty rate in the middle there	
11 negotiation and that is what could allow the royalties		11 where it says nine percent?	
12 between those companies or the profits between those		12 A Yes.	
13 companies to be manipulated. Did I misunderstand you?		13 Q Could you read that into the record, please.	
14 A No, that's correct.		14 A "Nine percent of net sales for all licensed products	
15 Q Now, I'm asking you what evidence you were shown, what		15 sold."	
16 documents you reviewed for your conclusion that the		16 Q Didn't you just tell me a few minutes ago that a	
17 royalty agreement between Todd McFarlane Productions		17 smaller percentage of gross sales might actually equal	
18 and TMP International was not the result of an arm's		18 a hire percentage of net sales?	
19 length negotiation or that there was anything improper		19 MS. EADS: Objection as to form.	
20 in the negotiation of the royalty rate contained in		20 Q You may answer.	
21 that royalty agreement?		21 THE WITNESS: Can you read back the	
22 MS. EADS: Objection as to form.		22 question?	
23 Q You may answer.		23 (Reporter reads back previous question)	
24 A We were provided only two other instances that the		24 A Yes.	
25 defendant would release to us regarding royalty		25 Q So wouldn't it be fair to say that a straight	

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	29		31
1	comparison of percentage rate is not appropriate when	circumstance, simply the fact that one person is the	
2	those percentage rates are calculated on a different	owner of two different businesses means that those --	
3	pool of revenues, in other words, you cannot make an	that a negotiation or an agreement between those two	
4	equal comparison of percentage rates when one is	businesses is somehow improper?	
5	calculated on the basis of net sales and another is		MS. EADS: Objection as to form.
6	calculated on the basis of gross sales, is that		
7	correct?	Q You may answer.	
8		A I didn't hear the last part of that question.	
9	MS. EADS: Objection as to form.	Q Okay, I'll make it clear. Is it your testimony that	
Q You may answer.		the lone fact that two businesses are owned by one	
THE WITNESS: Can you read back		individual means that any negotiations or agreements	
that question?		or contracts between those two businesses, two	
(Reporter reads back previous question)		corporate entities, is somehow improper, is that your	
A Yes, that would be true.		testimony?	
Q Okay, thank you. Now, before we got off on that, we		MS. EADS: Renew my objection.	
were talking about your statement that because Todd		A I didn't say the word improper.	
McFarlane is the owner of Todd McFarlane Productions		Q Okay, that's an important distinction here. I want to	
and the owner of TMP International, that the royalty		make sure we understand what you mean by arm's length	
agreement was not at arm's length negotiations, is		negotiation and that really gets to the guts of my	
that what you said?		question.	
A Yes, that's my answer on the basis that both companies		Are you saying that there's anything improper in	
are owned by the same party, by its very nature would		the royalty agreement or the negotiated royalty rate	
not be an arm's length deal.		between Todd McFarlane Productions and TMP	
Q Let's see if I understand what you're telling us		International, Inc.?	
here. Are you saying that -- let me ask you this --		A And are you referring to the impropriety in the	
strike that. You told me before that you've testified		context of Todd being the shareholder of both	
in probably over 400 cases, is that correct?	30	corporations?	
A Yes.		Q I just want to know what it is about Todd McFarlane	
Q I didn't ask you this, but I'd like to ask you this		being the sole shareholder of both those corporations	
now, how many of those would you say -- and you can		that provides the basis for you to tell the jury that	
just give me an estimate, are cases involving		the negotiations between those two companies that	
businesses, not family law?		resulted in a five percent of gross sales royalty rate	
A You mean business --		was improper in some fashion.	
Q That involves a business valuation or a breach of		MS. EADS: Objection as to form.	
contract action between two businesses. I don't want		Q You may answer.	
to talk about personal finances here, so I just would		A Within the context of Todd McFarlane negotiating with	
like you to rule out cases involving, you know,		himself, being the left side and the right side, as a	
people's personal assets.		shareholder of both corporations, it's a net sum	
MS. EADS: Objection as to form.		game. Profits in Company A can be moved to Company	
A Well, within the context of family law matters,		B. We are making the conclusion based on other items	
there's been businesses involved, so we're doing		of evidence, that that royalty was a higher rate when	
valuations of family held businesses.		it was done with outside parties.	
Q So you have lots of experience dealing with		Thus, the impact to Neil Gaiman is that he is	
businesses, many of which may be owned, wholly owned		receiving a royalty on a lower number. That's my	
by individuals, is that correct?		opinion.	
A Yes.		Q You just said, I believe, that Todd McFarlane	
Q Have you ever once seen a situation in which one		negotiating on behalf of one company is really	
individual was the sole owner of more than one		negotiating with himself when he's dealing with TMP	
business?		and TMP International, is that right?	
A Yes.		A That's correct.	
Q And is it your testimony that in every single		Q And that he can move profits from one to the other	

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1 because he gets 100 percent of the profits of both
 2 companies, is that right?
 3 MS. EADS: Objection as to form.
 4 Q You may answer.
 5 THE WITNESS: Read back the
 6 question again.
 7 (Reporter reads back previous question)
 8 A Yes, that's my understanding, that he owns 100 percent
 9 of TMP as well as TMP International and that he would
 10 enjoy the benefits of both companies.
 11 Q Are you aware of whether TMP International and TMP
 12 employ the same people or different people?
 13 A I don't recall the composition of both entities.
 14 Q Well, let me ask you to speculate on a few things
 15 here. You're an expert and you're entitled to do
 16 this. If the evidence shows that Todd McFarlane
 17 Productions and TMP International employed entirely
 18 different sets of employees, other than Todd
 19 McFarlane, the sole owner, at the time that this
 20 royalty agreement was negotiated in 1996, if the
 21 evidence showed that, would that affect your
 22 conclusion about the relative ease with which
 23 Mr. McFarlane might manipulate the profits between
 24 those two companies?
 25 A No.

33
 1 MS. EADS: Objection as to form.
 2 Q You may answer.
 3 THE WITNESS: Read back the
 4 question.
 5 (Reporter reads back previous question)
 6 A That's the only evidentiary documents coming from Todd
 7 McFarlane. The other basis of my opinion is my
 8 experience as a CPA relating to consulting with
 9 closely held businesses and performing other business
 10 valuations when there are related party enterprises.
 11 Q I'm talking about specific to this case, just things
 12 having to do with these two closely held companies,
 13 Todd McFarlane Productions and TMP International, just
 14 those two, the only evidence that you have seen and
 15 the only documents that you've relied on are the
 16 Capcom agreement at nine percent and the 989 Studios
 17 agreement at 11 percent, is that correct?
 18 MS. EADS: Objection as to form.
 19 Q You may answer.
 20 A Those are the only two documents that have given me an
 21 indication that they have exceeded the five percent
 22 rate.
 23 Q And you just explained to me, didn't we just look at
 24 that Capcom agreement and you just explained to me how
 25 a five percent and nine percent comparison between the

34
 1 Q So let me ask you this, would you agree with me that
 2 while it may not make any difference to Mr. McFarlane
 3 which of his companies makes a profit, it might make a
 4 difference to the employees of those companies?
 5 THE WITNESS: Read back the
 6 question.
 7 (Reporter reads back previous question)
 8 A It's entirely possible under that hypothetical, but
 9 the controlling manager or ultimate decision maker of
 10 both entities is Todd McFarlane.
 11 Q Do you have any evidence, Mr. Caven, were you shown
 12 any documents or told anything by any person that
 13 would allow you to conclude that Todd McFarlane
 14 manipulated the profits from TMP International, Inc.
 15 to TMP or vice versa?
 16 A I don't recall receiving any documentation either by
 17 e-mails or exhibits or documents from his accountant
 18 stating that that strategy would be in place.
 19 Q So the sole basis for your statement that the five
 20 percent royalty negotiated between TMP and TMP
 21 International was too low was because you saw an
 22 agreement between TMP and Capcom, for example, where
 23 the royalty rate was a higher rate, nine percent, and
 24 then another one where it was 11 percent, is that
 25 right?

36
 1 TMP International royalty agreement and the Capcom
 2 royalty agreement aren't really a true comparison,
 3 because one is based on gross sales and one is based
 4 on net sales, isn't that right?
 5 A We discussed that the two agreements are different.
 6 However, our calculations are done on net sales,
 7 because gross sales information was not available, so
 8 they are apples and apples.
 9 Q So you're saying your calculations were based on net
 10 sales, is that right?
 11 A That's correct.
 12 Q Would you read for me the last sentence of that
 13 paragraph, please, on page 5 that we've been looking
 14 at? Read it into the record, please.
 15 A "The second method is to assume that the appropriate
 16 rate for Todd McFarlane Productions should be at a ten
 17 percent of gross revenues with Gaiman's royalty based
 18 on 15 percent of the revised royalty due Todd
 19 McFarlane Productions."
 20 Q Now read for me the last sentence of the previous
 21 paragraph, please.
 22 A "Additionally, we have based those royalties on gross
 23 sales as stipulated in the royalty agreement between
 24 Todd McFarlane Productions and TMP International."
 25 Q So you based -- you've taken a ten percent royalty of

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	37	gross sales and stated that that's what should have been the negotiation between TMP International and TMP and that that's the amount upon which you based Gaiman's royalty in this case, is that correct, and that's what you just read or I heard you say?	ten percent of net sales on the same products, do you recall that?
1		MS. EADS: Hang on.	A Yes.
2		(Witness examines document)	Q So, again, my question is, isn't it likely that ten percent of gross sales, a higher percentage of a larger pool, could be significantly higher than nine percent of net sales on the same products?
3		A Yes, both calculations that we have done -- I have to retract my earlier comments, are done on gross revenue.	A That's true.
4		Q So your opinion is that for Mr. Gaiman's royalties on toys related to the Angela and Medieval Spawn and Cogliostro characters should be 15 percent of the revised royalty to Todd McFarlane Productions, and I'm reading from your report, is that correct, and that that revised royalty due Todd McFarlane Productions is ten percent of TMP International's gross sales on those products, correct?	Q Okay, thanks. When you said that the fact that Todd McFarlane was the owner of both TMP International and Todd McFarlane Productions, that fact meant that the royalty agreement between those two parties was not an arm's length negotiation, that is your testimony, isn't that correct?
5		A Correct.	A Yes.
6		Q Would you agree with me that ten percent of gross sales might be significantly higher than nine percent of net revenues on the same products?	Q And I want to understand exactly what you mean by arm's length negotiation, because I think sometimes that has a meaning in court and I want to make sure we understand what you mean by that term. Are you referring to simply the fact that Todd McFarlane as an individual was technically on both sides of that negotiation, is that the basis for your statement that it's not an arm's length negotiation?
7		MS. EADS: Objection as to form.	A Fundamentally, yes.
8		Q You may answer.	Q But you're not aware, I believe you testified this is
9		A Under your hypothetical, that's possible.	
10	38	Q Isn't it likely?	true, you're not aware of anything improper or any actual manipulation from one company to the other of profits or anything else that's evident in the royalty agreement negotiated between Todd McFarlane Productions and TMP International, is that correct?
11		A Not likely if they have small returns, or I mean, if net sales are close to gross sales, that difference may not be a factor.	MS. EADS: Objection as to form.
12		Q That would be true with respect to Todd McFarlane's calculations back in 1997 in choosing net revenue over gross sales, isn't that true?	Q You may answer.
13		MS. EADS: Objection as to form.	A Do you want to define -- I'm not sure I understand your word of improper.
14		THE WITNESS: Read back that last one.	Q Well, illegal, wrong, something that would cause employees or other accountants to question the reporting.
15		(Reporter reads back previous question)	MS. EADS: Which of all three of those are you asking about?
16		A I'm not sure I understand the question.	MR. SALSICH: We can break them down. I thought that was sort of different ways of saying the same thing.
17		Q When you were telling me why it was incorrect for Todd McFarlane Productions to calculate based on net revenues instead of gross sales, my understanding is you told me there were two problems. One, it seemed to differ from the royalty agreement, and, two, it would result in a significantly lower number because the gross sales might be a significantly higher pool among which to calculate a percentage, is that right?	Q I'm just trying to make sure that I understand you when you say this is not an arm's length negotiation, that your only statement is that it's simply not an arm's length negotiation is because that definition cannot apply when one person sits on both sides of the agreement.
18		MS. EADS: Objection as to form.	If that's what you're saying, I understand that, but I want to make sure you're not saying anything
19		A Yes.	
20		Q And then you also gave me an example where I think you said five percent of gross sales, I think your example was eight percent of gross sales might be the same as	

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	41		43
1	more and that's why I'm asking you these questions.	1	Q And, again, my question to you, maybe I can make it
2	Do you understand?	2	simpler rather than asking to read it again, is simply
3	MS. EADS: Why don't you just ask	3	this, are you going to offer testimony at trial, offer
4	him to define it? Can you answer his question?	4	an opinion that there was any manipulation of profits
5	Q Do you understand my premise, Mr. Caven?	5	or improper manipulation of royalty rates or anything
6	A I'll try to restate the premise so that --	6	else improper or illegal in the negotiations of this
7	Q Please do.	7	royalty agreement between Todd McFarlane Productions
8	A If I understand the question, is that is the premise,	8	and TMP International, Inc.?
9	because Shareholder A and Shareholder -- or	9	MS. EADS: Objection as to form.
10	shareholder of Company A or shareholder of Company B	10	Q You may answer.
11	are one and the same person and that there isn't a	11	A I will not be giving an opinion that it was illegal
12	willing buyer and willing seller who are different	12	because the only party or shareholder is common to
13	parties, that is the basis of my conclusion.	13	both entities.
14	Q That's what I want to break down. Are you saying that	14	Q So in other words, the fact that Mr. McFarlane owns
15	it's impossible for two different companies -- strike	15	these two companies doesn't make anything illegal, is
16	that. I just want to know, are you going to testify,	16	that correct?
17	are you going to offer opinion that there was some	17	A That's correct.
18	actual manipulation of profit between TMP	18	Q And the fact that Todd McFarlane owns both those
19	International and Todd McFarlane Productions in the	19	companies doesn't automatically mean he has
20	negotiations and entering into of the royalty	20	manipulated the profits between those companies, isn't
21	agreement negotiated between those two parties in	21	that correct?
22	1996?	22	A He has the ability to manipulate.
23	MS. EADS: Objection as to form.	23	Q It's possible, isn't it?
24	THE WITNESS: Read back the	24	A Yes, and then provided by other evidence such as the
25	question, please.	25	Capcom, where three or four months later he enters
	42		44
1	(Reporter reads back previous question)	1	into an agreement at a higher rate.
2	THE WITNESS: Read that back again	2	Q At a higher rate based on a different, smaller spool
3	a little slower.	3	of revenues, correct?
4	(Reporter reads back previous question)	4	MS. EADS: Objection as to form.
5	A I have one question and that is -- maybe that's an	5	A How are you defining smaller?
6	assumption, that the agreement I don't have in front	6	Q Well, isn't Capcom a nine percent royalty rate based
7	of me, but that it was a 1996 agreement.	7	on net revenues?
8	Q I'm sorry, yes, it's TM01237 and it's the agreement	8	A Yes.
9	that you referred to and cite on page 5 of your	9	Q And didn't you tell me that -- isn't the royalty
10	report.	10	agreement between TMP International and TMP five
11	A I agree that it's -- I only have one of the pages, I	11	percent of gross sales?
12	don't have all three pages in front of me, so I just	12	A Yes.
13	wanted to make sure that that's the date.	13	Q Thank you. Other than what we've just talked about
14	Q I'm sorry, I will read it to you and I'll read it into	14	and what's contained in the -- it looks like the first
15	the record. The first page of that agreement states	15	two complete paragraphs on page 5 of Exhibit 203, is
16	it's a royalty agreement, it's page number TM01237.	16	there anything else upon which you base your opinion
17	It states that, "Agreement, (hereinafter 'agreement')	17	that Mr. Gaiman should have been paid a royalty of 15
18	is entered into as of the 12th day of December 1996 by	18	percent of ten percent of Todd McFarlane Productions'
19	and between Todd McFarlane Productions (hereinafter	19	revenues? Let me restate that, I misspoke that last
20	licensor)," et cetera, et cetera, et cetera, and, "TMP	20	part, I want to make sure it's clear.
21	International, Inc. (hereinafter licensee)," does that	21	You offered opinion that the royalty rate between
22	help you answer my question? I think we know which	22	Todd McFarlane Productions and TMP International
23	royalty agreement we're talking about, do we not?	23	should have been ten percent of TMP International's
24	MS. CARTER: He has it in front of	24	gross sales and that that's the amount of revenues
25	him.	25	upon which Neil Gaiman's 15 percent toy royalty should

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	45		47
1	have been calculated, is that correct?		of the Spawn comic book series, do you see that?
2	THE WITNESS: Could you read that	2	A Yes.
3	back.	3	Q On what basis do you make the statement that these
4	(Reporter reads back previous question)	4	people reached an oral agreement?
5	A Yes.	5	A Only in my conversations with Neil and his counsel.
6	Q Other than what we've just been talking about here and	6	Q Anything else?
7	what's contained in the two full paragraphs on page 5	7	A No.
8	of your report and the sources that are referred to	8	Q You did tell me that you reviewed the deposition
9	therein, do you have any other basis for offering that	9	transcript of Todd McFarlane, is that correct?
10	opinion?	10	A Yes.
11	A No.	11	Q Did anything in that deposition transcript influence
12	Q Thank you.	12	your statement that these parties reached an oral
13	A Can we take a two-minute break?	13	agreement in 1992?
14	MR. SALSICH: Yes, let's take a	14	A I don't recall, without having to review that one more
15	break now. Off the record.	15	time, that there was a discussion specifically
16	(A short recess is taken)	16	discussing the foundation in 1992 of that
17	Q Mr. Caven, I'd like to ask you a few sort of	17	understanding.
18	background questions about your report here. We got	18	Q So but as far as you know, your basis was
19	started talking about your opinions and we jumped	19	conversations with Neil and his counsel, is that
20	right to page 4 and 5 of Exhibit 203, but I wanted to	20	right?
21	ask you some questions about some of the things you	21	A Correct.
22	stated in the earlier pages. Do you have that Exhibit	22	Q And do you have any understanding as to the specific
23	203 in front of you?	23	terms of the oral agreement that you referred to in
24	A Yes.	24	the first sentence of page 2 of Exhibit 203?
25	Q Can you tell me, did anyone assist you in the	25	A Well, my understanding is that the agreement was to be
	46		
1	preparation of this report?	1	better than his DC contract that Neil was working
2	A Yes.	2	under. Those were really the premise or terms that he
3	Q Were they people on your staff?	3	was discussing with Todd.
4	A Yes.	4	Q Better than or equal to or exactly what compared to
5	Q Did you verify all of the work that those people did?	5	Neil's DC contract?
6	A To the best of my abilities, yes.	6	A My understanding was better than.
7	Q And are you confident in the work that those people	7	Q Better than in any particular fashion or just
8	did such that you're confident that this is your	8	generally better?
9	individual expert witness report?	9	A I would have to say generally better.
10	A Yes.	10	Q Did Neil tell you in any specific fashion how the oral
11	Q Is the same true of the schedules that we've marked as	11	agreement between him and Todd in 1992 was going to be
12	Exhibit 204?	12	better than his DC comic contract?
13	A Yes.	13	A Not that I can recall at this time. If there was a
14	Q And is the same true of the supplemental report that	14	specific framework, I just don't recall that.
15	we've marked as Exhibit 205?	15	Q Do you recall anything else about the terms of the
16	A Yes.	16	oral agreement?
17	Q If you would take a look at page 2 of Exhibit 203, and	17	A Not at this time, without reviewing any of my notes
18	I'm going to work primarily from that one and not the	18	from Neil.
19	supplemental report, at least initially, okay?	19	Q Whatever you might recall would come from your
20	A Okay.	20	discussions with Neil Gaiman, is that correct?
21	Q Under the subheading and background of key factors in	21	A Yes, and his counsel.
22	the case, in your first sentence you say that it is	22	Q You stated that your understanding was that the terms
23	your understanding that in 1992, Todd McFarlane, Todd	23	would be better than the DC Comics contract that Neil
24	McFarlane Productions, Inc. et al reached an oral	24	was working under at the time, did I understand you
25	agreement with Neil Gaiman as to Gaiman's contribution	25	correctly?

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1 A I don't know if I said at the time, I just said his DC
 2 contract. I think it was at that time that he had
 3 various agreements with DC, but I would have to kind
 4 of go back to that document.

5 Q Neil didn't tell you that he and Todd agreed in 1992
 6 that their terms would be better than an agreement
 7 Neil might negotiate in the future, did he?

8 A I don't know if he made that distinction.

9 Q A couple sentences down, you state, and I quote, "It
 10 is Gaiman's assertion that McFarlane made oral
 11 representations as to the financial compensation to be
 12 paid to Gaiman concerning Spawn issue number nine," do
 13 you see that?

14 A Yes.

15 Q What were those oral representations that
 16 Mr. McFarlane made?

17 A That the payment or royalties for the Spawn 9 issue
 18 would need to -- it is my understanding that there was
 19 additional work to be done and that there would be
 20 royalties paid on that project that would be better
 21 than other writer royalties that he had received in
 22 the past.

23 Q And what's your basis for that testimony you just
 24 gave?

25 A Just my discussion with Neil.

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1 raised between Neil and Todd.

2 Q So maybe I can just -- we can move this along if I ask
 3 you this, other than what Neil may have told you he
 4 and Todd talked about, do you have any independent
 5 understanding or verification of any of the terms or
 6 discussion points that led to or were part of the 1992
 7 oral agreement to which you refer in your Exhibit 203?

8 A Not that I'm going to be testifying to or giving a
 9 legal opinion on. Those were all documents that we
 10 have a series of discussions, I would imagine,
 11 deposition discussions on this, but I'm not opining to
 12 those discussions.

13 Q Are you saying you've seen documents that outline
 14 terms that were discussed in the oral agreement in
 15 1992?

16 A No, I didn't say that.

17 Q Well, that's what I'm trying to get at, I'm only
 18 talking about the 1992 oral agreement that you refer
 19 to in the first paragraph of page 2 of Exhibit 203,
 20 that's the only agreement of any kind I'm talking
 21 about right now.

22 A Okay.

23 Q And I just want to know, and as you sit here, it's
 24 your statement that Gaiman asserted to you that
 25 McFarlane made oral representations as to the

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1 Q So Neil told you that Todd made these representations?

2 A I think that was the discussion in our meeting with
 3 counsel, that he felt that that was the only way he
 4 was going to continue on the project.

5 Q Which project are you referring to?

6 A The Spawn 9.

7 Q And what exactly did you mean by Neil -- the only way
 8 Neil felt he was going to continue on that project?

9 A Is if Todd agreed to the terms to pay royalties on his
 10 character.

11 Q What do you mean by that?

12 A Well, that the writer royalty would be paid and that
 13 there were characters being derived within the context
 14 of that project and that there would be royalties
 15 based on those characters.

16 Q So are you telling me that Neil has told you that
 17 during or before Neil's completion of Spawn issue 9
 18 that he and Todd McFarlane specifically discussed and
 19 agreed on royalties paid for future use of characters
 20 Neil was creating in Spawn 9?

21 A No, I don't think I'm saying that at that time,
 22 because I don't know if I was in the discussion in
 23 which we broke down at what point of evidence of when
 24 those discussions -- because I understand it was a
 25 series of discussions over time. Those issues were

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1 financial compensation to be paid for Spawn 9, only at
 2 least that's where your period is in this paragraph?

3 A Yes.

4 Q And that's what I'm talking about, what do you know
 5 about oral representations made by Todd McFarlane
 6 regarding Gaiman's compensation for Spawn 9?

7 A I would have to review my notes on the specifics of
 8 Spawn 9, other than the fact that it's my
 9 understanding that there would be royalties paid at or
 10 better than what he was receiving and Neil stressed
 11 the word better to me over the phone with respect to
 12 the Spawn 9 project.

13 Q And when you say better, you're referring to Neil's DC
 14 Comics contract, is that correct?

15 A That's correct.

16 Q So it's your understanding based on Neil's assertions
 17 to you that -- strike that, let me start that over.
 18 Other than Neil's assertions to you that he and Todd
 19 reached an oral agreement in 1992 that Neil would be
 20 compensated at or better than his DC Comics contract,
 21 you are not aware of any other terms that may or may
 22 not have existed in an oral agreement in 1992 to which
 23 you referred?

24 A That's correct, nothing has been brought to my
 25 attention at this time.

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1	Q That's fine, we can move on from there. Let's turn to 2 page 3 of Exhibit 203. In your second full paragraph, 3 beginning with the words on or about December 17, 4 1996, do you see that?	53	1 Q Let me just ask you this generally and I'll ask it 2 more specifically from time to time. You've just 3 explained to us that a number of your -- a significant 4 part of the background information or some of the 5 background information and some of the data upon which 6 you relied was provided to you by Neil Gaiman, is that 7 correct, or his counsel?	55
5	A Yes.		8 A Yes.	
6	Q You mention that Larry Marder sent memos to Neil 7 Gaiman proposing compensation terms for Gaiman's work 8 on the comics, do you see that?		9 Q And you've just given me an example of one particular 10 place where you were able to independently verify the 11 accuracy of what Mr. Gaiman or his counsel told you?	
9	A Yes.		12 A Correct.	
10	Q And then you go on to say, quote, "As the proposed 11 terms were not in accordance with Gaiman's 12 understanding of the oral agreement, Gaiman rejected 13 the offers," do you see that?		13 Q Wherever possible, did you independently verify things 14 that Mr. Gaiman or his counsel told you?	
14	A Yes.		15 A I'd have to think about that question, I'm not sure I 16 could respond, were there examples in which I 17 independently verified --	
15	Q How were the proposed terms from Larry Marder 16 different from Gaiman's understanding of the oral 17 agreement?		18 Q Well, I will ask you some specific examples, but let 19 me ask you this, as a general matter in your business, 20 as a professional in your industry, is it your 21 practice to independently verify as much as possible 22 the information given to you by your clients in 23 evaluating a business or in discussing litigation 24 damages?	
18	MS. EADS: Objection as to form.		25 A I'm not sure of what you mean by as much as possible.	
19	Q You may answer.			
20	A Without going back to all of the documents and my 21 notes, I think in general, I'll just say that Neil 22 felt the proposed terms were not what he understood, 23 and therefore sent further documents subsequent to 24 February outlining to Todd an outline of the terms 25 that he was thinking that the two were working under	54		
1	for these projects.	54	1 Q I don't really know how else to say it, I certainly 2 would expect that there might be certain circumstances 3 that the only source of a piece of information might 4 be from the client and there's nothing else you can do 5 except take it at face value, but I would also imagine 6 that there are instances where if your client told 7 you, for example, that my contract with ABC Company 8 gives me ten percent of such and such, that you would 9 not simply take that at face value, but that you would 10 look at his contract with ABC Company to see if that 11 is accurate.	56
2	Q Maybe I can just ask you this question, if you look 3 at -- starting with page 2 of Exhibit 203 and the 4 subheading background and key factors of the case, 5 starting there and going up to the end of the second 6 full paragraph on page 3, the one we just discussed, 7 is it fair to say that your recitation in those four 8 paragraphs is simply your understanding of the 9 background as Neil Gaiman explained it to you?		12 That seems to me to be the kind of independent 13 verification that someone of your professional stature 14 would do as a matter of course, but I don't want to 15 assume that, so that's why I'm asking you those kinds 16 of questions. I realize it's a general question and 17 that's all I'm asking at this point, but that's the 18 basis, so I'm going to ask you the question again.	
10	A And his counsel, yes.		19 Wherever possible, in your professional 20 expertise, did you in this case make an attempt to 21 independently verify information provided to you by 22 Mr. Gaiman or his counsel in your calculations of the 23 damages that you state that Mr. Gaiman is owed in this 24 case?	
11	Q Now, the next --		25 A Only to the extent that I felt it was professionally	
12	A Can I amend that answer?			
13	Q Certainly, go ahead.			
14	A At the top, there is a statement between the years '92 15 through '96, Gaiman received \$194,000. We actually 16 verified that information from Neil's --			
17	Q I see that, so the first sentence of the first full 18 paragraph on page 3 that references a specific amount 19 of money paid to Neil Gaiman, you didn't take that 20 figure from Neil Gaiman's statement, you independently 21 verified that, is that correct?			
22	A Yes, we at least worked through a lot of his exhibits 23 and exhibits that we received from McFarlane to know 24 how much the payments were during a period of time, 25 yes.			

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1 necessary to verify that information.		1 that relate to these particular correspondences or	
2 Q So if we use professionally necessary as our		2 other documents that have been Bates stamped and	
3 benchmark, if I ask you specific questions, will you		3 transitioned, that I would recall the information	
4 tell me whether you believe it was professionally		4 based upon that review.	
5 necessary in a certain circumstance to independently		5 Q My specific question is, did you prepare written notes	
6 verify what Neil told you?		6 in the process of preparing the expert reports which	
7 A Yes, I'll tell you whether or not it was, in my		7 you've provided to us in this case?	
8 judgment, necessary to independently verify it.		8 A Yes, I have written notes with respect to preparing	
9 Q That's fair, okay. Moving on, on page 3, in the		9 these exhibits 203, 204 and 205.	
10 center of the page, you start a paragraph that is		10 Q And do those written notes reflect conversations that	
11 followed by some bullet indents that says you have		11 you had with Mr. Gaiman and/or Mr. Gaiman's lawyers	
12 provided documents, do you see that?		12 about any of the statements or opinions or rationale	
13 A Yes.		13 contained in your expert report?	
14 Q And I see five bullet points right below that, the		14 A They may contain some, but not all.	
15 first of which simply describes a meeting that		15 MR. SALSICH: Have we been provided	
16 Mr. Gaiman and Mr. McFarlane had in and around April		16 a copy of those notes?	
17 1997, do you see that?		17 MS. EADS: I don't think you've	
18 A Yes.		18 asked for one.	
19 Q Were you provided with any information or documents or		19 MS. CARTER: Well, we're asking	
20 did you have any discussions with Neil or his lawyers		20 now, so if we can get them at your earliest	
21 as to what was discussed during that meeting between		21 convenience.	
22 Mr. Gaiman and Mr. McFarlane?		22 MS. EADS: Sure.	
23 A Not in specific terms that I can recall at the moment,		23 MR. SALSICH: I didn't realize we	
24 without consulting my notes or looking at other		24 needed to ask under Federal rules of procedure,	
25 documents, other than the documents that we received		25 but we are doing so now.	
	58		60
1 or the facts at that time, that's all I can recall.		1 Q Let's me move on, Mr. Caven. The second bullet you	
2 Q Did you bring any of your notes with you today,		2 have on the middle of page 3 there and the third and	
3 Mr. Caven?		3 the fourth and the fifth, I see point to four pieces	
4 A No, I was not asked to.		4 of correspondence, am I accurate on that?	
5 Q You mentioned a few times when I've asked you		5 A Yes.	
6 questions, you said that without consulting your		6 Q And I understand them to be a May 5, 1997 letter from	
7 notes, you wouldn't be able to answer that. You know,		7 Neil Gaiman to Todd McFarlane and then a July 15, 1997	
8 I understand that that may be true, but let me ask you		8 letter from Gaiman to McFarlane along with a July 15,	
9 this, did you prepare extensive notes or any notes,		9 1997 reply from McFarlane back to Gaiman and an	
10 written notes in compiling your expert reports that we		10 additional July 15, 1997 reply from Gaiman back to	
11 have here today?		11 McFarlane, did I accurately characterize those four	
12 MS. EADS: Objection as to form.		12 pieces of correspondence?	
13 A Can you read back the question?		13 A That's what's stated in the report, yes.	
14 Q I can do better than that, let me ask you a different		14 Q Do you have those four pieces of correspondence with	
15 question. You have answered me a half dozen times or		15 you?	
16 so today by saying that you were not able to answer		16 A No, I do not.	
17 with any certainty a particular question without		17 MR. SALSICH: Gina, can we --	
18 referring to your notes, would you agree with me that		18 MS. CARTER: I have them right	
19 that's something you said today?		19 here.	
20 A Yes.		20 MR. SALSICH: -- give them to him?	
21 Q So I'd like to ask you, are you referring to written		21 MS. CARTER: Here's May 5, July 15	
22 notes that you prepared in preparation of your expert		22 to Todd, July 15 from Todd to Neil, am I one	
23 report?		23 short?	
24 A There are some written notes, it also may be in the		24 MR. SALSICH: I think these have	
25 form that I've categorized or assembled my documents		25 all been previously marked as deposition exhibits.	

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1	MS. CARTER: I'm just trying to see	1	A Yes.
2	if the pile reflects the exhibits that Mr. Caven	2	Q And then lastly, there's an additional handwritten
3	relied on in preparing his report contained the	3	note from Neil Gaiman back to Todd McFarlane also
4	last July 15, '97 from Gaiman to McFarlane. If	4	dated July 15, 1997, with the first word, "Hurrah," do
5	not, that would be the last one, in any event, you	5	you have that in front of you?
6	could start with the other ones.	6	MS. CARTER: That's the one we
7	MR. SALSICH: I think that's	7	don't have, so we will get that.
8	deposition Exhibit 33, Gina.	8	MR. SALSICH: We can work off the
9	MS. CARTER: Why don't you go ahead	9	first three for now.
10	and I'll get them.	10	MS. CARTER: That's fine, we'll get
11	MR. SALSICH: That's fine, we won't	11	the other one.
12	get into a lot of detail on these just yet.	12	Q You state that you were provided the following dialog
13	Q I have some questions just generally for you, though,	13	between the parties and we just discussed those
14	Mr. Caven. Do you have in front of you a May 5, 1997	14	documents that you received, did you receive from
15	letter that appears to be from Neil Gaiman to Todd	15	Mr. Gaiman or his counsel or from any source any other
16	McFarlane and I think it's TM00475 and 476?	16	documents that you believe clarify or describe the
17	A Those aren't the same Bates numbers we have.	17	terms of the discussion between Neil Gaiman and Todd
18	Q Probably because this document's been marked by both	18	McFarlane in the summer of 1997?
19	parties.	19	A I may have, but these are the ones that I extracted
20	MS. CARTER: Why don't you just go	20	the framework to formulate my opinions.
21	by the date and how it starts.	21	Q So as far as any opinions you're going to offer, these
22	Q The May 5, 1997 letter has been previously marked in	22	are the sum total of the documents in this category
23	Sheila Egger's deposition as Deposition Exhibit 2.	23	upon which you relied, is that correct?
24	A That's correct, I have that.	24	A Correct.
25	Q We can refer to that, it's the same document. Let's	25	Q You go on immediately after those five bullet points
	62		
1	refer to it as its exhibit number, is that the May 5,	1	and you have a statement that says, "The agreement
2	1997 letter that you referred to on page 3 of your	2	reached as of July 15, 1997 provided in part," and
3	expert report, Exhibit 203?	3	there's some additional discussion, do you see that?
4	A Yes.	4	A Yes.
5	Q And then do you have in front of you a July 15, 1997	5	Q I'd like to ask you what you mean by the term the
6	letter to Todd McFarlane from Neil Gaiman that appears	6	agreement reached as of July 15, 1997.
7	to -- I believe it's been previously marked as	7	A Well, the agreement being the series of correspondence
8	Deposition Exhibit 19?	8	between the parties and my discussion with Neil, that
9	A Yes.	9	this was the framework that they were agreeing to for
10	Q Is that the July 15, 1997 fax correspondence that you	10	purposes of the royalty calculations.
11	referred to on page 3 of your expert report, Exhibit	11	Q Now, you used the word framework and you also used the
12	203?	12	word agreement, do you understand those words to mean
13	A Yes.	13	the same thing or do you intend for those words to
14	Q And then do you have in front of you a handwritten	14	mean the same thing?
15	letter from Todd McFarlane to Neil Gaiman dated July	15	A Not being a lawyer, I guess I would be using those to
16	15, 1997 which I believe has been previously marked as	16	be the same thing.
17	Deposition Exhibit 20?	17	Q I don't want to trick you and I'm not asking you to
18	A Yes.	18	make a legal statement. In fact, let me ask you this
19	Q It starts with the words, "My Dearest Neil"?	19	right now, are you going to offer any opinion in this
20	A Yes.	20	case as to whether or not at any time in 1992 or 1997
21	Q And at one point, it says, "Beauty," really big?	21	or any time, Todd McFarlane or any of his companies
22	A Yes.	22	entered into a legally binding contract with Neil
23	Q Is that the July 15, 1997 fax correspondence from	23	Gaiman?
24	McFarlane that you referred to on page 3 of your	24	MS. EADS: Objection as to form.
25	expert report, Exhibit 203?	25	Q You may answer.

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1 A If I understand the question, I'm not going to be 2 providing a legal opinion to the basis or binding 3 element within the context of this agreement as a 4 lawyer, saying that there's a reasonable meeting 5 between the parties and that it's a binding agreement 6 or a legal conclusion. I'm not going to be stating 7 that as one of my opinions.		1 was a project that he would have taken that particular 2 character, similar to what that other character had 3 done at Image, within the form of a series or multiple 4 comic books or a miniseries, I think is another 5 industry term, with that particular character. 6 It was my understanding from my discussions with 7 Neil that he could use his creativity in terms of how 8 to market, put artistic covers or put together a trade 9 paperback, which is a collection of comic books all in 10 one particular bound set.	
8 Q So when you say agreement and then other times you use 9 the term contract in some of your schedules, you are 10 referring, correct, to the exchange of four letters 11 we've just discussed and which you have identified 12 here on page 3 of your expert report, is that correct?		11 Q I believe in there you stated that the industry term 12 miniseries and the industry term one off meant the 13 same thing, did I understand you correctly?	
13 A Yes.		14 MS. EADS: Objection as to form.	
14 Q And you're not offering any testimony as to whether 15 those four letters actually did form a legally binding 16 contract, are you?		15 Q You may answer.	
17 A No, I'm not offering a legal opinion.		16 A I said that one off and miniseries, in my discussions 17 with Neil, were the same thing, that Neil said it is 18 common in our industry to do a series of these 19 particular comic books and it would be almost akin to 20 another definitional term that is used called 21 miniseries.	
18 Q You're making an assumption, however, that they did, 19 when you go on to calculate royalties due under that 20 contract, as you call it, is that correct?		22 Q And you got this from Neil, is that right?	
21 A That's correct.		23 A Neil and subsequently when I was talking with Mike 24 Martens, which was part of my Exhibit 205 and Denis 25 Kitchen, we used that word interchangeably.	
22 Q I'd like to know what is the basis of your assumption 23 that that was a contract, is that something Neil 24 Gaiman told you or his lawyers told you?			
25 A I don't remember who specifically made the final			
	66		68
1 conclusion, but it was a discussion that this was the 2 deal that we agreed to and that was the basis of my 3 calculations and my report.		1 Q And who is Mike Martens?	
4 Q So when you were asked to calculate the royalties 5 owed, which you've done in your report, you were asked 6 by Neil Gaiman or his lawyers to assume that these 7 four letters exchanged in May and July of 1997 formed 8 a contract between the parties and also specifically 9 outlined all the terms of that contract, is that 10 correct?		2 A He's the VP of product development, I think now, or 3 business development for Dark Horse Comics. He used 4 to also work here in Madison for Capital City.	
11 A Yes.		5 Q And what kind conversations did you have with 6 Mr. Martens?	
12 Q In the first bullet after the language we've just 13 discussed about the agreement reached as of July 15, 14 1997, do you see the first bullet where you make 15 reference to something called a one off?		7 A Several conversations with Mr. Martens regarding 8 splitting of profits, developing a crossover type 9 project in which you collaborate a character with a 10 character with a different publisher and take on that 11 project to be a series of comics and then how it 12 evolves into a trade paperback.	
16 A Yes.		13 Q Did you ask Mr. Martens or did Mr. Martens tell you 14 that the term one off by itself, with no other 15 explanatory terms, means a miniseries as opposed to 16 just one issue of something?	
17 Q The second full sentence there, could you read that 18 for me into the record, please.		17 A He was familiar with the term one shot, but when I 18 explained that Neil was using the term one off to be a 19 collection, we then described the project to really be 20 a multiple set of comics then that would be assembled 21 into a trade paperback at a later point in time.	
19 A "The industry term of one off means a short series of 20 comic books followed by a trade paperback(s) 21 containing the same works, and may involve other 22 characters from different publishers."		22 Q So is it fair to say or is it accurate to say that 23 Mr. Martens did not tell you that the term one off 24 appearing by itself meant a miniseries, but rather, 25 you told Mr. Martens that that's what Neil Gaiman was	
23 Q And I'd like to ask you, where did you get that 24 definition of the term one off?			
25 A The original discussion was with Neil, that one off			

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1	using the term to mean, is that correct?	1	with the Todd McFarlane division of Image, the rights
2	MS. EADS: Objection as to form.	2	to do a one off Angela comics project and a one off
3	Q You may answer.	3	Medieval Spawn project," do you see those three lines
4	THE WITNESS: Read back the	4	there or two lines?
5	question.	5	A Yes.
6	(Reporter reads back previous question)	6	Q Did I read that correctly?
7	A Yes, I probably initiated the conversation in terms of	7	A Yes.
8	the premise of what the nature of my question was with	8	Q Now, you just were telling me that because -- that
9	respect to crossovers and laid that as the	9	Neil explained that he might do other Angela projects
10	foundation. I did not ask him to opine the definition	10	with the Todd McFarlane division of Image Comics and
11	in the industry as one off being a one shot or one	11	that those were the two, three, five issues or series
12	project definition. I did not ask him to make that	12	things he might do?
13	distinction.	13	A Correct.
14	Q So when you talked to Mr. Martens, you started from	14	Q Is that right, is that what you're referring to?
15	the assumption that you were dealing with a miniseries	15	A Those are the comics, yes, the subsequent issues with
16	that would involve trade paperbacks and you simply	16	Spawn and Angela.
17	discussed with him how different publishers might do	17	Q Now, I'm going now to the next phrase, the next clause
18	that and what profit splitting arrangements might take	18	in that sentence where he says, "Exclusive of those
19	place under that type of arrangement, is that correct?	19	other projects, I have the rights to do a one off
20	A That's correct.	20	Angela comics project and a one off Medieval Spawn
21	Q And your understanding -- your basis for assuming that	21	project."
22	a miniseries was contemplated by Neil was that in this	22	And I just want to focus on one off Angela comics
23	July 15, 1997 exchange that came from Neil, is that	23	project and one off Medieval Spawn, which in Neil's
24	correct?	24	words, are exclusive of these other sources or other
25	A Yes, it initially started with Neil and I think it was	25	things he might do with Image, do you follow me?
	70		
1	fair to say that that was the foundation that both I	1	A Yes.
2	and Denis Kitchen were furthering our discussions on	2	Q I'm only focusing on the definition of one off Angela
3	this issue.	3	comics project and one off Medieval Spawn project, and
4	Q So it's based on Neil's assertion that when he used	4	so my question is, you have made a -- you offered an
5	the term one off in his July 15, 1997 letter to Todd,	5	opinion in this case and I believe we'll get to it
6	he meant a miniseries and trade paperbacks, is that	6	shortly in your schedules, that that particular clause
7	correct?	7	in this letter would have entitled Neil Gaiman to do
8	A Correct, and I think it also goes to Exhibit 19 in	8	at least a four issue miniseries and trade paperbacks
9	Neil's letter to Todd towards the bottom of the bigger	9	and you calculated royalties based on that assumption,
10	paragraph that starts, "That I have, exclusive of any	10	am I correct?
11	other Angela projects I might do with the Todd		MS. EADS: Objection as to form.
12	McFarlane division."		THE WITNESS: Can you read back the
13	When we asked Neil to explain that, that's where	13	question?
14	he was stating that the project wouldn't just be one	14	MS. EADS: The question is awful
15	comic, but it would be a series of comics similar to	15	long. There's probably nothing wrong with it,
16	other Image projects that had been done in the past,	16	except I lost track of it.
17	that there was a series of one, two, three, five, he	17	Q That's a good enough reason to make a short one,
18	even envisioned that there could be five or up to ten	18	because I want to make sure you understand me. The
19	different comics.	19	premise of the question is this, I'll tell you the
20	Q Let's look at that language and I'll ask you to take a	20	premise and ask you the question. My premise is I'm
21	closer look at that language on Exhibit 19, that first	21	looking at the language of Exhibit 19 that we've just
22	sentence to which you just referred. As I read it,	22	been discussing and I'm only referring to the language
23	follow along with me, it says, "That I have," meaning	23	in the second line, where it says a one off Angela
24	Neil has, as part of what he believes they've agreed	24	comics project and a one off Medieval Spawn project,
25	to, "Exclusive of any other Angela project I might do	25	do you see that?

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1 A Yes.		1 Q You may answer.	
2 Q Would you agree with me that based on that language		2 A Are you referring to -- maybe stated differently, are	
3 that Neil used, the one off Angela comics project and		3 you referring -- or clarification, are you referring	
4 the one off Medieval Spawn project, were separate from		4 to the fact that have we calculated any future	
5 or exclusive of any other projects that he might do		5 projects that Image and Todd McFarlane would have	
6 with Image Comics?		6 produced in a future Angela project that Neil and Todd	
7 MS. EADS: Objection as to form.		7 collaborated on, is that --	
8 You're asking him to interpret a document at this		8 Q Or might collaborate on, yes, that is what I'm asking	
9 point.		9 you.	
10 Q You may answer the question.		10 A And we're not talking about the use of the Angela	
11 MS. EADS: Maybe it's just that		11 character by Image or Todd, that they have actually --	
12 we're hungry, I don't know.		12 Q That's correct, we're not talking about that. Let me	
13 MS. CARTER: Why don't we just let		13 see if I can make this simpler and I've probably	
14 him answer the question, which would be finished		14 mucked it up because I'm hungry, too. I simply want	
15 quickly if you can let him answer.		15 to know if you're offering an opinion, and we'll get	
16 Q Did you understand my question?		16 to the schedules later, but I believe it's contained	
17 A I think I do and I'll try to restate it the best I		17 in your schedules B-17 through B-20.	
18 can.		18 You calculate an amount of royalties due to Neil	
19 Q Sure.		19 Gaiman that he would have been entitled to under this	
20 A As I understand it, you're asking whether or not Neil		20 particular paragraph on Exhibit 19, if he were	
21 had the right to do projects with Image, in addition		21 permitted to do the one off Angela comics project and	
22 to a project or -- can I use the word with another		22 the one off Medieval Spawn project, is that correct,	
23 comic company.		23 that you may have made calculations of royalties due,	
24 Q Let me stop you there, because that wasn't what I		24 assuming Neil would have been able to do a one off	
25 meant and I'm glad you attempted to clarify it,		25 Angela comics project and a one off Medieval Spawn	
	74		76
1 because we would have spent a bunch of time going down		1 project?	
2 the wrong road there. I'm not referring to anything		2 A Yes.	
3 that Neil might do with Image Comics or any other		3 Q And you've made a calculation there on those schedules	
4 language other than to the extent he mentioned right		4 that -- and you make a statement here on page 3 of	
5 here that those might exist.		5 Exhibit 203 that the term one off means a short series	
6 Would you agree with me that the first sentence		6 of comic books and you've actually, based on Denis	
7 there in that large paragraph on Exhibit 19 that we've		7 Kitchen's report, assumed that that would equal four	
8 been reading indicates that Neil contemplates that he		8 comic books, is that right?	
9 might have other Angela projects with the Todd		9 MS. EADS: Objection as to form.	
10 McFarlane division of Image, would you agree with me		10 Q You may answer.	
11 that that's stated there?		11 A I've defined it within the context that I'm making the	
12 MS. EADS: Objection as to form.		12 premise, it's a crossover project not with Image, but	
13 THE WITNESS: Read back the		13 with other publishers.	
14 question.		14 Q I understand that, I'm only talking about how many	
15 (Reporter reads back previous question)		15 issues it would contain.	
16 A I don't know if I can interpret that that's a		16 A Right, and I relied upon the opinion of Denis Kitchen	
17 contemplation, other than to keep a variable open,		17 on the amount of comic books or trade paperbacks that	
18 meaning I can do comics with Image, I can do them with		18 would have been sold, had there been the crossover	
19 DC, Dark Horse, whomever.		19 project with other publishers.	
20 Q Let me ask you this, are you offering an opinion, have		20 Q I understand, and you and Denis Kitchen -- is it your	
21 you calculated any royalties on anything referenced in		21 understanding that you and Denis Kitchen both relied	
22 this paragraph we've been talking about in Exhibit 19,		22 on Neil Gaiman for the assumption that whatever that	
23 other than the short phrase one off Angela comics		23 crossover project might have been, it would have	
24 project and one off Medieval Spawn project?		24 contained four issues instead of three or two or one?	
25 MS. EADS: Objection as to form.		25 MS. EADS: Objection as to form.	

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 1 Q You may answer.
 2 A No, I didn't rely solely on Denis Kitchen or solely on
 3 Neil Gaiman. In fact, in talking with Mike Martens,
 4 it was his opinion that a trade paperback would be
 5 approximately 120 to 130 pages, which using an average
 6 comic book of 32 pages, would have a minimum page
 7 count of about 120 to make a trade paperback.

8 There are trade paperbacks that, yes, have gone
 9 less than 120, but it was kind of a thought process
 10 that 120 comic book pages or more in a trade paperback
 11 is about the rule of thumb.

12 Q So in your discussion with Mr. Martens, is it your
 13 testimony that either you and Mr. Martens or
 14 Mr. Martens worked backwards from the existence of a
 15 trade paperback to determine approximately how many
 16 issues would be contained in that, in other words, did
 17 Mr. Martens assume that in your discussion with him,
 18 that a trade paperback was part of the equation and he
 19 had an understanding of approximately how many pages
 20 would be appropriate in a trade paperback?

21 It is from that information that he worked back
 22 to the opinion that four issues seemed correct for a
 23 one off?

24 MS. EADS: Objection as to form.

25 A I don't recall if it was a front to back or a back to

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 1 front final conclusion, but I do recall as we were
 2 stating, the premise of the questions that I was
 3 posing to him, that that was the ultimate conclusion,
 4 but I don't know if that was derived as a starting
 5 point from a, hey, let's work backwards or work
 6 forward. I think it was a fluent conversation.

7 Q But you've already told me before that Mr. Martens did
 8 not define the term one off to mean miniseries, that
 9 was simply the discussion that you all had based on
 10 Neil's -- when Neil had told you he and Todd had
 11 agreed to, is that right?

12 MS. EADS: Objection as to form.

13 Q You may answer.

14 THE WITNESS: Read the question
 15 back, please.

16 (Reporter reads back previous question)

17 THE WITNESS: Read that back one
 18 more time.

19 (Reporter reads back previous question)

20 A Yes, it was basically our discussion that the project
 21 that we were talking about was relating to the concept
 22 of a multiple issue project that would then ultimately
 23 be collected into a trade paperback.

24 MS. EADS: How much longer do you
 25 intend to go on?

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 1 MS. CARTER: Could we stop here
 2 maybe, Pete?
 3 MR. SALSICH: Sure, this is as good
 4 a point as any.
 5 MS. CARTER: One hour?
 6 MR. SALSICH: Or less, whatever you
 7 want to do.

8 (Noon recess is taken)
 9 (12:45 p.m. to 1:45 p.m.)
 10 (Mr. Smith takes the place of Ms. Carter)
 11 Q Mr. Caven, before we took our lunch break, we were
 12 working our way through the opinions that you stated
 13 in your expert witness report, your initial report
 14 which we marked as Exhibit 203. I'd like to continue
 15 to ask you some questions about that and hopefully
 16 fairly quickly we can move on to the schedules which
 17 you attached to that report, and, finally, your
 18 supplemental report.

19 If you can turn to page 3 of Exhibit 203, do you
 20 recall right before lunch we were discussing the first
 21 bullet in the bottom section there, referring to one
 22 offs, do you recall that discussion?

23 A Yes.

24 Q It's my understanding that your opinion when
 25 calculating royalties on schedules B-17 through B-20

is going to be that those royalties are calculated on
 the basis of Neil Gaiman being contractually entitled
 to do a four part miniseries for the Angela -- as an
 Angela one off and a four part series as a Medieval
 Spawn one off, is that correct?

THE WITNESS: Can you read back the
 question? That seemed to be multiple parts.

(Reporter reads back previous question)
 Q You know what, let me try to -- I'm going to do it
 more quickly, so we can try to cut down on how many
 times we have to read things back and I'm glad you're
 being careful to make sure you understand my
 question.

A I also just want to apologize, I'm just getting over
 an ear infection, so being on speaker phone and the
 sound of the room, that just makes it difficult.

Q Sure, no, I understand. I'm going to try to be a
 little bit more concise this afternoon, if I can.
 That might not be genetically possible, so I just want
 to make sure I understand.

In schedules B-17 through B-20 you calculate a
 minimum and a maximum royalty that you claim Neil
 Gaiman is entitled to under the letter that we've
 marked as -- that was marked as Exhibit 19 wherein it
 refers to his rights to do a one off Angela project

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1	and a one off Medieval Spawn project, is that right?	1	evidence turned out that it was really only one and
2	A Can I ask for clarification?	2	not four, that that would affect the calculations of
3	Q Sure, please do.	3	royalties you made on schedules B-17 through B-20, and
4	A When you say B-17 through B-20 on minimum and maximum,	4	my understanding is that your testimony is it would
5	you're referring to the exhibits in Exhibit 205 as	5	affect those calculations?
6	opposed to the schedules in Exhibit 204?	6	A Yes.
7	Q Yes, yes, the most recent -- correct, that's right, my	7	Q Okay, that's all I have. Moving on to page 4 of your
8	understanding is that those numbers still correspond	8	Exhibit 203, the paragraph that you have under the
9	to the Angela and Medieval Spawn one off projects, but	9	subheading assignment?
10	yes, I'm referring to your schedules B-17, B-18, B-19	10	A Yes.
11	and B-20 that were attached to your supplemental	11	Q In the first sentence, you say that towards the end of
12	report.	12	the first sentence, you are to determine the economic
13	A So the question as it stands is did I rely on --	13	sums due Gaiman under the terms of the agreement, do
14	Q No, the question stands as simply this, is the royalty	14	you see that?
15	calculation contained -- both the minimum and maximum,	15	A Yes.
16	contained on schedules B-17 through B-20, based on an	16	Q When you say terms of the agreement, are you referring
17	assumption that the one off project as defined and as	17	to the four letters exchanged in July, in May and July
18	described in the 1997 letters refers to a four part	18	of 1997 between Neil Gaiman and Todd McFarlane?
19	comic miniseries?	19	A Yes, I'm generically describing that is the framework
20	A Yes, it does refer to a four part miniseries and trade	20	of the agreement, whether there is any other
21	paperback.	21	additional framework which I don't recall at this
22	Q It's stated in the second sentence on the first	22	moment, but it would all be contained within the
23	full -- on the bottom of page 3 of Exhibit 203, where	23	context of those bullet points in the mid part of
24	you say that the industry term one off means a short	24	page 3.
25	series of comic books followed by a trade paperback,	25	Q You're not referring to any economic sums due Gaiman
	82		84
1	correct?	1	under the terms of any DC Comics contract, are you?
2	A Yes?	2	MS. EADS: Objection as to form.
3	Q My question to you now is this, if the evidence shows	3	Q You may answer.
4	that a one off does not mean a miniseries of three or	4	A I'm not sure I understand the question.
5	four issues, but rather means simply a one issue	5	Q Well, I just want to make sure I understand. When you
6	project, would that affect the royalty calculations	6	say the terms of the agreement, you said that you're
7	you have on schedules B-17 through B-20?	7	referring to the four letters exchanged and identified
8	MS. EADS: This is a hypothetical	8	by your bullet points on page 3 of your expert
9	you're asking?	9	report.
10	A Hypothetically, yes, it would, because you would be	10	And my question is simply a follow-up to that, to
11	describing a one shot, is I guess the correlative to	11	make sure that you were not referring to any economic
12	your -- it's not a one off, but a one shot, so you	12	sums that might be due to Neil Gaiman under a DC
13	would have one comic book versus a series of comic	13	Comics contract, is that correct?
14	books. We have used the estimate of four comic books	14	MS. EADS: Same objection.
15	in our analysis, but you are describing only a one	15	MR. SMITH: Is your objection as to
16	comic, I guess, comic project under your hypothetical.	16	form in general?
17	Q So it would affect the royalty calculations if it	17	MS. EADS: That's the only legal
18	turns out that what the parties contemplated in 1997	18	objection that you are permitted to make in a
19	was only a one issue project as opposed to a four	19	deposition, and that includes all of the various
20	issues project, correct?	20	objections. I believe it is currently the belief
21	A Well, you have two different assumptions, one versus	21	that if you say objection cumulative, objection
22	four, and, yes, they are going to be different, but	22	asked and answered, or in fact in any way describe
23	that's contrary to what I was held to believe in my	23	your objection, it could be considered coaching,
24	discussions with Neil, as well as reading Exhibit 19.	24	and that's why objection as to form is the only
25	Q I understand that, I'm simply asking you if the	25	proper objection, although I'll be happy to make

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	85	them more specific, if you like.	87	A Well, you asked the question.
1		MR. SMITH: Are you addressing your question to me, Joan?		Q I understand and maybe my question was too broad. Let me see if I can clarify that, we'll get to that point, and any additional assertions by Neil, because I know that that comes up frequently. I just want to take this first sentence.
2		MR. SALSICH: Let's go off the record a second.		Your statement here is that the primary basis for payments to Gaiman is presented in Gaiman's letter dated May 5, 1997, correct?
3		(Discussion off the record)		A Yes.
4		MR. SALSICH: Can you read back the last question, please.		Q And I want to -- and I understand -- are you saying that your basis for saying that that's the primary basis for payments to Gaiman and not something else is that Neil Gaiman told you that that was the primary basis of how royalties to him should be calculated?
5		(Reporter reads back previous question)		A What I recall him telling me is that the outline in Exhibit 2 was the framework that the two parties were working on to do the comics and trade paperbacks for royalty purposes.
6		A What I don't understand to the question is under a DC contract.		Q And Exhibit 2 is what you used in calculating the royalties that you've done here in your schedules and your reports for comics and trade paperbacks, correct?
7		Q All right. You know what, I'm going to take your answer as it stands. If it comes up later, I'll ask you again. We can spend all day on this. If you would turn to page 8 of Exhibit 203, please.		A Correct.
8		A I'm there.		Q Let's take a look at Exhibit 2, if you would. The second paragraph -- and read that two sentence
9		Q Okay. At the top of the page under the heading comics and trade paperbacks, you state in the -- well, actually, why don't you, if you would, read for me, please, into the record the first sentence of that paragraph.		paragraph into the record for me, if you would.
10		A "Based on our review of documents and assertion by Gaiman, the primary basis for payments to Gaiman is presented in Gaiman's letter dated May 5, 1997 addressed to Todd (McFarlane) (TM00355)".		A "As we discussed, I've put together a set of figures which are based on the basic DC deal. (This is the standard DC deal, and not the kind of super deluxe deal I've got on, for example, Stardust.)"
11				Q Let me ask you this, did you take a look at whatever Neil might have called the basic DC deal in calculating your royalties based on the percentages in Exhibit 2?
12		Q And we've already discussed that May 5 letter that you're referring to there, which is a document that was previously marked in a deposition as Exhibit Number 2, correct?		A I may have looked at it, I don't recall if I studied it at length, because I was not asked to do that, to see if it matched this particular document.
13		A Correct.		Q So you did not independently verify whether the -- whether Neil's listing of royalty rates on Exhibit 2 in fact was based on the basic DC deal, did you?
14		Q I'd like you to keep that nearby, because I may have some questions about that. I understand the first part of that sentence where you say, "Based on our review of documents," but then you say, "Assertion by Gaiman," and I'd like to know what assertion by Gaiman you're referring to in that sentence.		A No, I was not asked to do that.
15		A Give me a minute to review the --		Q Is it the circumstance where you believe it was not professionally necessary to make that verification?
16		Q Please take your time.		A Yes, I would say it was not professionally necessary, because this is the document that the two parties were working off of and whether it's a shorter version or a longer version of the DC contract, it was not pertinent, because under the assertions by Gaiman, these were the factors or framework that I should be working off of.
17		A -- documents in Exhibit 204.		
18		(Witness examines document)		
19		A Okay, assertions by Gaiman, it essentially would be noted as it's relative industry practice that the advance or script fee, royalty fees paid in advance would actually be the total amounts due, if the actual units sold times the royalty rates were actually less than the advance payments.		
20		Q We'll get to that.		
21		A That would be one assertion.		
22		Q Okay, I was really looking just -- I want to make sure that I understand the very first sentence of this.		

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1	Q So you trusted Gaiman's assertions that the royalty	1	determine the definition of extensive use in that
2	rates he's got in Exhibit 2 were in fact based on the	2	contract.
3	basic DC deal, as he said in that letter?	3	Q Other than brainstorming with Neil and his lawyers
4	MS. EADS: Objection as to form.	4	about what would be a reasonable measurement as to
5	Q You may answer.	5	come up with the term extensive use, did you look at
6	THE WITNESS: Read back the	6	any other documents where a character appearing on
7	question.	7	five pages would trigger some sort of royalty?
8	(Reporter reads back previous question)	8	A I don't recall if we saw any other documents.
9	A Yes, I relied on that information.	9	Q If you saw any other documents and relied on them for
10	Q If you can turn to page 9 of your Exhibit 203, please.	10	anything in your expert report, would you have listed
11	A I'm there.	11	that information in your expert report?
12	Q Three subheadings from the bottom, you've got a	12	A Yes.
13	category called, "Other appearances of Angela	13	Q Is it possible that extensive use can mean appearing
14	(schedule B-12)," do you see that?	14	on ten pages out of 20 or 22, that that might have
15	A Yes.	15	been a reasonable measure of extensive use?
16	Q And in there, you say that the May 5, 1997 letter from	16	A It's open to interpretation, that it could be ten
17	Gaiman to McFarlane provides Gaiman with royalties	17	pages, it could be 20 out of 20 pages under your
18	for, quote, "Extensive use," close quote, of the	18	hypothetical.
19	characters in other publications, do you see that?	19	Q And I see that in schedule B-13 and schedule B-14 as
20	A Yes.	20	you've got them reflected here on page nine of your
21	Q And point to me in Exhibit 2 where you see that.	21	exhibit, you also use that same calculation for
22	A That's the third paragraph from the bottom.	22	extensive use, is that correct, for Cogliostro and
23	Q Could you read it please, including the subheadings?	23	Medieval Spawn?
24	A "Character equity: (This activates in the event of	24	A Yes.
25	'Extensive Use of Character, or character's name in	25	Q And based on that same discussion that you had with
	90		92
1	the title of the publication'")	1	Neil and his lawyers as to what a reasonable
2	Q Anywhere in Exhibit 2, is there any definition of what	2	definition of extensive use might be, is that correct?
3	extensive use of character means?	3	A Yes.
4	A No.	4	Q Nothing else?
5	Q You go on, on page 9 of your expert report, to say	5	A Not that I recall at this time.
6	that for purposes of this analysis we have defined,	6	Q But if there was something else, you would have
7	quote, "Extensive use," close quote, to be an	7	included that in your report, correct?
8	appearance by the characters on more than five pages	8	A Yes, we would have included it in our report.
9	of the publication, do you see that?	9	Q Where are your work papers right now, Mr. Caven?
10	A Yes.	10	A A couple different locations, my office at home, my
11	Q How did you arrive at that conclusion?	11	office at Virchow Krause, some in my possession now.
12	A In discussions with Neil and counsel, we just asserted	12	Q You have some in your possession now?
13	that there's, on average, 20 to 22 pages of content	13	A Minor, just copies of the exhibits and there are on
14	within a publication and determined that through our	14	occasion certain other subdocuments, but not all
15	discussions with Neil, that a reasonable, I guess,	15	documents.
16	ratio would be approximately 20 to 25 percent for	16	Q Have we been provided with copies of everything that
17	purposes of the extensive use of a character.	17	you have with you now?
18	Q Neil stated in Exhibit 2 that all these royalty terms	18	A No.
19	he's identified, including that character equity in	19	MR. SALSICH: I'd like to formally
20	Exhibit 2, are based on the basic DC deal, did you	20	request on the record that we be provided those
21	take a look at the basic DC deal to see if extensive	21	documents and that copies be made so that we can
22	use of a character in this provision is defined?	22	use them in the deposition.
23	MS. EADS: Objection as to form.	23	MS. EADS: Sure, that will mean a
24	Q You may answer.	24	break.
25	A I don't recall going back to the DC contract to	25	MR. SALSICH: We don't have to do

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	93	it right now, I just want to make sure we can get it done.		95
1		MR. SMITH: Did you say you don't want to do it right now?	1	project, other than he contributed some ideas and sketches?
2		MR. SALSICH: Yes, we don't need to take a break right now.	2	A He gave a couple ideas, which they ultimately, as I understand it, took these ideas and ran with it, but you know, essentially, they were very rough ideas or concepts and that essentially what they wanted is to use his name on a particular work of art in which they were going to be writing and drawing.
3		MR. SMITH: Okay, just checking.	3	And this was kind of his payment that he requested, I think there was also a royalty of eight percent that was part of the deal, but my understanding from Neil is that he only got the \$45,000 payment.
4		MR. SALSICH: I don't have much more until we get into the schedules and that will be an easy place to take a break.	4	Q How does that arrangement with Big Entertainment equate with what happened with Angela's Hunt?
5		THE WITNESS: Maybe you just want to review what are documents that are not exhibits and make copies of those.	5	A My understanding is that Neil's name was used on Angela's Hunt as being the named person on the cover, which Neil did not provide any efforts artistically, either writing, art, whatever, editing, to the project.
6		MR. SMITH: Sure, we'll do that on a break.	6	Q So if it turned out that Neil in fact did contribute writing, et cetera, to Angela's Hunt, would your conclusion be different?
7		THE WITNESS: Rather than copy the whole thing, because 60 or 70 percent of it is a copy of 204.	7	A I'm not sure of your hypothetical, I'd have to look.
8		MR. SMITH: We'll look at it on the break. I'm sorry, Pete, go ahead.	8	Q I'm just trying to understand how this fits together.
9		Q On page 11 of Exhibit 203, you have a category of a subheading called use of names, do you see that?	9	and biography in the publication of Angela's Hunt in an amount of \$45,000, is that correct?
10		A Yes.	10	1 A Yes.
11		Q And I believe in there you calculate that Gaiman is entitled to the compensation of the use of his name	11	2 You said that Neil got \$45,000 from the Big Entertainment contract for lending his name to something that he didn't work on, and I asked you how that related to the situation with Angela's Hunt.
12			12	3 And you said it was your understanding that on Angela's Hunt, Neil's name, et cetera, was used on the cover, just like in the Big Entertainment deal, and without, you know, being his work and stuff.
13			13	4 And so my question to you is, if it turned out to be true that the Angela's Hunt situation was different than the Big Entertainment situation, because in fact Neil's name is on the cover, because Neil was the author of Angela's Hunt, would that change your conclusion that the Big Entertainment contract is an appropriate measure of your damages here?
14			14	5 MS. EADS: Objection as to form.
15			15	6 Your genetics are getting to you again.
16			16	7 A I'm not sure how it would change my opinion under that hypothetical, since I haven't been provided any of the facts to support that hypothetical.
17		They actually did all the writing and all the artistic work and just used his name on the front cover to sell these particular products or comics, and Neil felt this was the best illustration of when he's actually given his name or lent his name to a project and this is the fee that he charged.	17	8 Q Well, let me ask you this, Mr. Caven, you're going to be testifying as an expert witness and one of the things that expert witnesses do on the stand all the time, as I'm sure you very well know from all of your experience, is they're asked to offer an opinion based
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19			19	
20			20	
21			21	
22			22	
23			23	
24			24	
25			25	

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1	on hypotheticals including facts that may or may not 2 be put into evidence.		Q And in my hypothetical where Neil is the author of 3 Angela's Hunt, the Big Entertainment situation would 4 not apply, correct?
3	So I'm going to ask you right now to give me your 4 answer to this, based on -- assuming one piece of 5 evidence. You've already given me the basis for why 6 you think \$45,000 is due for the use of Neil's name 7 and biography on Angela's Hunt.		4 MS. EADS: Objection as to form. 5 Q You may answer.
8	Now, I'm asking you to change one factor and 9 that is this, if the evidence shows that Neil Gaiman 10 was the author of Angela's Hunt, would you agree with 11 me that that is a different situation than you've 12 described or Neil described in relation to the Big 13 Entertainment contract?		6 A What troubles me is the fact that there is a clause 7 here that says he may do additional Todd projects with 8 Image, which my understanding. This particular trade 9 paperback came after the deal as a collection. 10 Q Mr. Caven, we're getting a little far afield. I just 11 have a very simple question for you and I think you've 12 given the answer, but I just want to make sure I 13 understand it. I'm not asking about Exhibit 2, I'm 14 not asking about negotiations back in 1997, I'm simply 15 asking a simple question.
14	MS. EADS: Objection as to form.		16 Angela's Hunt is a trade paperback collecting 17 Angela issues one, two and three. It's not a new 18 project that Neil did, it's not an Angela project he 19 did after this agreement, it's simply a collection of 20 three publications that Neil did prior to this 21 agreement or this discussion of the agreement back in 22 1997. It contains three comic book issues that Neil 23 wrote.
15	Q You may answer.		24 I think you and I are in agreement here, but I 25 want to make sure that the Angela's Hunt situation as
16	A For quickly going through any of the schedules, do you 17 have a reference?		
17	Q I don't believe this is part of a schedule, I think 18 the only place that I've seen this number is right 19 here on this page.		
20	A No, only to Angela's Hunt, is Angela's Hunt a 21 different name? We have multiple names on certain 22 things.		
21	Q I'm just asking you to assume one piece of evidence 22 for me, okay, assume that Neil wrote Angela's Hunt.		
22		98	
1	If Neil wrote Angela's Hunt, would you agree with me 2 that that is a different situation than Neil described 3 and you relied on as Neil's arrangement with Big 4 Entertainment?		1 I've just described it is very different from Neil's 2 situation as reflected in the Big Entertainment 3 contract, where he was paid a certain amount of money 4 for the use of his name in connection with something 5 that he did not work on, isn't that true?
5	MS. EADS: Object as to form. Do 6 you understand the question?		6 MS. EADS: Objection as to form.
7	Q You may answer.		7 Q You may answer.
8	A I'm not -- because I have Angela's Hunt as a trade 9 paperback, is that a correct assumption?		8 A He worked in forming the sketch under the Big 9 Entertainment, which they then performed all of the 10 remaining tasks under the Big Entertainment contract 11 and it was a fee which was used to compensate him for 12 the artistic statement or on the cover, that this was 13 a Neil Gaiman publication. The --
10	Q Angela's Hunt is a trade paperback. It contains the 11 three issues of Angela, every word of which were 12 written by Neil Gaiman. Let's assume that's the 13 evidence. I think the record will bear that out, but 14 let's assume that's the evidence, even if I'm off a 15 little bit.		14 Q So did Neil's work appear in the Big Entertainment 15 project or not?
16	Let's assume that the evidence shows that 17 Angela's Hunt contains comic books, collects comic 18 book issues that Neil Gaiman was the author of. Would 19 you agree with me that that circumstance regarding 20 Angela's Hunt is different than the circumstance you 21 described and Neil described to you regarding his 22 relationship with Big Entertainment?		16 A My understanding is Neil actually wrote down 12 17 different sketches of which six were used by Big 18 Entertainment.
23	A Under your hypothetical, I would have to say that the 24 standard writer and creator royalty or collected 25 editions royalty would apply.		19 Q So is Neil's payment from Big Entertainment for the 20 use of his name as a marketing tool or is it for the 21 contribution of the ideas upon which the publication 22 was based?
			23 MS. EADS: Objection as to form.
			24 Q You may answer.
			25 A Neil asserts that it's for the contribution of his

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1	name, even though there was some efforts provided, but he thought the major thrust of the core of the payment was to compensate him for the use and marketing of his name on the product.		1	to apples here, I've asked you some questions about the relationship defined in that Big Entertainment contract, okay?	
2			2		
3			3		
4			4	A Yes.	
5	Q And that is a product in which no words or artwork of Neil Gaiman's actually appeared in the finished project, correct?		5	Q And you've told us that Neil told you that in the Big Entertainment contract, he received \$45,000, he contributed some sketches on some of the pages, but basically that was payment for use of his name in connection with it and that's it, is that correct?	
6			6		
7			7		
8	A I don't know about words, because once again, he provided the outline or sketch, so there could have been words as part of that sketch that were infused into the product.		8		
9			9		
10			10	A Yes.	
11			11	Q And you also testified, I believe, it's true that that was payment for the use of his name on something that he was not the author of, as far as you know, correct?	
12	Q Was Neil compensated as an author under the Big Entertainment contract?		12		
13			13		
14	A He was to get eight percent of royalties on that Big Entertainment contract.		14	A Correct.	
15			15	Q Now, back to my simple question, wouldn't you agree with me, and this is a very simple proposition --	
16	Q So was the \$45,000 simply an advance for the use of his name or an advance for the use of his ideas?		16	MS. EADS: Counsel, you know, it's inappropriate for you to keep characterizing your own questions, but go ahead, if you're compelled to do it.	
17			17		
18	A Both.		18		
19	Q Well, we're trying here to figure out how you can say that that makes a legitimate leap to govern the situation with Angela's Hunt.		19		
20			20		
21			21	Q Wouldn't you agree with me that the circumstances involved in the publication and the use of Neil's name in connection with Angela's Hunt differ from the circumstances involved with the use of Neil's name under the Big Entertainment contract in at least one	
22			22		
23			23		
24			24		
25	A Because with Angela's Hunt, Neil's name was put on the cover or used without his permission, and Neil asserts that he would have requested or needed permission to use his name on that particular publication.		25		
		102			
1	Q Are you offering an opinion in this trial as to whether or not Neil needed -- or whether Neil needed to give his consent before the McFarlane people could put his name on Angela's Hunt?		1	respect, and that respect is that Neil is the author of Angela's Hunt and he's not the author, as far as you know, of whatever was published under the Big Entertainment contract deal?	
2			2		
3			3		
4			4		
5	I realize that's what Neil's asserted, I'm asking whether you are going to offer an expert opinion as to whether or not Neil's consent was necessary to use his name in connection with the publication of Angela's Hunt.		5	MS. EADS: Objection as to form.	
6			6	A Those would be the two differences or the difference between the two contracts.	
7			7		
8			8	MR. SALSICH: Okay, that's all I	
9			9	have. Why don't we take a short break now and then we're going to go into the schedules, and I'm going to do a little comparison between your Exhibit 203 and Exhibit 205. Why don't we take a short break now and make sure we get those work papers copied and a bathroom break, et cetera, and come back in like five minutes.	
10	A That would be a legal conclusion.		10		
11	Q You're not offering an opinion?		11	(A short recess is taken)	
12	A I'm not offering that.		12	(Ms. Carter takes the place of Mr. Smith)	
13	Q I'm not asking you about consent. You testified that you came up with a -- you've assumed that Neil needed to give his consent for the use of his name on		13	MS. EADS: It sounds like everybody	
14	Angela's Hunt and that he did not give his consent and therefore he's entitled to some measure of damages for		14	is ready and I think the witness wanted to make a statement after he's checked some of his documents.	
15	that use, is that correct?		15		
16			16		
17			17		
18			18		
19	A Yes.		19		
20	Q Now, in order to come up with \$45,000 instead of \$75,000 or \$5000, you've relied on one document and that's the contract that Neil had with an outfit called Big Entertainment, correct?		20		
21			21		
22			22	A The Angela's Hunt, what I was looking for in my cheat sheet, largely because, you know, we have some different names used for Angela's Hunt and Angela	
23			23	Spawn and all those types of things, so I couldn't	
24			24		
25	Q And in order to make sure that we're comparing apples		25		

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1	find my little cross reference. In looking at that	1	Q And it's my understanding both page 5 of Exhibit 205
2	publication, yes, we did calculate the royalties and	2	and page 13 of Exhibit 203 are entitled attachment
3	that the use of the name is really for, as I	3	table I, correct?
4	understand it, a separate cause of action.	4	A Yes.
5	If we have no agreement or no contract, that the	5	Q And they are tables that reflect, in your words,
6	calculation of that \$45,000 should not be listed as	6	quote, "A range of compensation earned and balance
7	part of the table on page 13 in the grouping, but	7	due," correct?
8	should be a stand alone entry right below that and	8	A Correct.
9	that's really an alternative course of damages, rather	9	Q Which of these two figures, as you sit here today --
10	than inclusive part of all damages, because we are	10	excuse me, which of these two tables, as you sit here
11	calculating the royalty on that publication.	11	today, should we be working from?
12	Q So if I understand you correctly, your \$45,000	12	A Well, the more recent table is on Exhibit 205.
13	assertion of damages for the use of the name is	13	Q That's on page 5 of 14 on Exhibit 205?
14	identified in your expert witness report on page 11	14	A Correct.
15	that we were talking about?	15	Q Wherever necessary, in referring to a table, I'll do
16	A Page 11?	16	my best to refer to this one, because I don't want to
17	Q Page 11 of your Exhibit 203?	17	use old data, if it's going to make a difference,
18	A I've got page 13.	18	okay?
19	Q Well, page 13 is your --	19	A Correct.
20	A Oh, yes, I understand where you're going on page 11.	20	Q So my question is about your table that reflects the
21	Q That's what we were talking about before and I see	21	range of compensation earned and balance due. I
22	that on page 13, it shows up as a category under use	22	understood you just to clarify that the use of name
23	of name, the \$45,000 appears there, correct?	23	category amounting to \$45,000 should not be above the
24	A Correct, and I guess the best way to clarify it is	24	line as compensation earned under the contract, but
25	that should be a drop down damage below this	25	rather should be below the line as something that
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1	particular table, because it's -- this particular	1	would be earned if there was no contract, is that
2	table is under the premise or assumption that there is	2	correct?
3	a contract where the use of the name is below where	3	A That's correct, it's an alternative form of damage.
4	there would be no contract and his name should be	4	Q I follow you. Anything else you wanted to clarify
5	compensated.	5	based on earlier testimony?
6	Q Okay, so let me ask you two questions about that.	6	A That's the only thing that I recall after flipping
7	First of all, just to clarify, your \$45,000 figure	7	through to show Mr. Smith the documents, that's when I
8	there for use of name is not based on any contractual	8	found my document that I was actually looking for.
9	royalty that Neil might or might not be entitled to	9	Q And thanks for doing that, Mr. Caven. I know it's
10	under a contract because he's the author of Angela's	10	been a long day and we still have some more time, but
11	Hunt, correct?	11	if you feel the need to do some clarification again
12	A Correct.	12	like that, it's perfectly appropriate and we welcome
13	Q The \$45,000 is based, as you said before, on Neil's	13	it.
14	analysis of the Big Entertainment deal as a comparable	14	Let me ask you now some questions about the
15	use of his name, correct?	15	attachment table I which is part of Exhibit 203 and
16	A Correct.	16	then attachment table I that is part of Exhibit 205.
17	Q Now, my second question about what you just said is to	17	You told us that we should use the more recent of
18	make sure I understand you correctly on where you	18	those two and I'd like to ask you why we should use
19	believe it actually belongs on the table on page 13,	19	the more recent of the two.
20	and just so -- this leads me to a second question and	20	A Well, 205 on its face is our supplemental report to
21	I want to make sure we're working from the right	21	Exhibit 203.
22	document, so let me real quickly, while we're doing	22	Q And what changes have you made to attachment table I
23	this, ask you to take a look at page 5 of your	23	in the supplemental report?
24	supplemental report that's been marked as Exhibit 205.	24	A The only difference is under comics. I shouldn't say
25	A Correct.	25	the -- only the category of comics have changed and

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1	the category of foreign royalties from the one off 2 trade paperback, which is really a subcategory of 3 comics, but I listed it separately.	1 minimum and maximum on page 9 of Exhibit 205 and the 2 only places that I see a difference are in the last 3 four entries on Schedules B-17 through B-20, which 4 refer to one offs and one off trade paperbacks, is 5 that correct?	
6	Q And that's been added in its entirety, correct?	6 A That's what I just testified to.	
7	A That's correct.	7 Q I'm just making sure we're on the same page. I also 8 see that the minimum royalty, the minimum compensation 9 has been increased in the supplemental report over 10 what it was on Exhibit 204 and the only places that I 11 see that were increased were the compensation on B-18 12 and B-20 for one off trade paperbacks, is that 13 correct?	
14	Q And comics has been changed to reflect a new maximum 15 royalty or maximum compensation, correct?	14 A That's correct.	
16	A Yes.	15 Q Then we can use the summary of compensation in Exhibit 16 205. Other than the change in method of calculating 17 royalties for the one offs including the second 18 category of the sharing of property on the one offs, 19 are there any other changes in your opinions between 20 your initial expert report and your supplemental 21 expert witness report?	
21	Q Has the minimum compensation changed under comics?	22 A Well, the minimum changes due to B-18 and B-20 is 23 reflecting the updated supplemental report by Denis 24 Kitchen calculating or estimating the units sold.	
22	A It did, yes.	25 Q Right, okay, so we have -- it's saying that there are	
23	Q Okay, it looks like by about \$6000 or so?		
24	A Yes.		
25	Q Will you be able to, when we get to it, point to me where that change appears in your schedules?		
1	A Without checking the software, I will try my best.		
2	Q Would it be on page 9 of your supplemental report?		
3	A Yes.		
4	Q And that is a summary of compensation for comics,		
5	correct?		
6	A Yes.		
7	Q And that is page 9 of 14 on Exhibit 205, correct?		
8	A Yes.		
9	Q In the schedules that you provided with your first		
10	report that we've marked as Exhibit 204, the second		
11	page that I have of that, it's not numbered, but it's		
12	the second page in my stack, is also titled summary of compensation for comics. Do you have that in front of you?	110 1 two differences in your supplemental report as regard opinions with the initial report, the first is that 2 based on Denis Kitchen's supplemental report, he's 3 calculated a higher amount of sales for the one off 4 trade paperbacks, correct?	
13	A Yes.	5 A Correct.	
14	Q And it looks to me, if we look first at the summary of compensation you provided in Exhibit 204, it looks to me like there's no difference between the minimum compensation and the maximum compensation, is that correct?	6 Q And based on his calculation of sales of the one off and the one off trade paperbacks, you have calculated compensation due on those, correct?	
15	THE WITNESS: Can you read back the question?	7 A Correct.	
16	(Reporter reads back previous question)	8 Q And the second change or new opinion in your supplemental report is this additional measure of damages or method of calculating the damage on the one offs by doing it in a sharing of profits method with Neil Gaiman in the publisher's position, is that correct?	
17	A Yes.	9 A Correct.	
18	Q Now, in the summary of compensation for comics on page 9 of Exhibit 205, there is a difference of, it looks like, around \$110,000 or \$105,000, can you explain to me why there is a difference, why there's a new maximum compensation in your supplemental report?	10 Q And that results in the new category of maximum Gaiman compensation reflected in schedules B-17, 18, 19 and 20, correct?	
19	A Under the maximum, which we had discussed that we would be investigating, was the concept of splitting of profits on the trade paperbacks and comics from the one off projects, and so Exhibits B-17 through B-20 reflect a change between the two exhibits, Exhibit 204 and Exhibit 205.	11 A Correct.	
20	Q And so is it -- I just went down the two columns, the	12 Q Other than those two changes, are there any other opinions that appear in your supplemental report that are different from or in addition to those that appeared in your initial report?	

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1 A	That are not noted in the bottom footnotes of each of those four pages?	1 THE WITNESS:	Can you read back the question?
2 Q	I'm just asking you to tell me if there's something else in addition to those two categories of changes that I should be looking at in your supplemental report. I don't think so, but I don't want to characterize it, that's why I'm asking you.	3 (Reporter reads back previous question)	
3 A	Those are the only two columns that have been modified.	4 A	In a nonlegal sense or in a nonlegal opinion, that's what I read from this particular concept, is that he is giving his right to Neil to use that for this crossover project.
4 Q	And in addition -- I'm sorry, there was one more you added, foreign royalties on one off trade paperbacks, correct, based on your conversations with Michael Martens at Dark Horse?	5 Q	Did you discuss this publication -- excuse me, let me strike that. When I asked you at the start of the deposition if you had conversations with Neil Gaiman during the preparation of your supplemental report, you said you thought you had, but you didn't remember specifics. Now, I want to ask you a specific question.
5 A	Correct.	6	This method of damages that you calculated in your supplemental report which is reflected in the first full paragraph on page 3 of Exhibit 205, I'm asking if you discussed that particular method of damages with Neil Gaiman.
6 Q	I do have a question for you on page 3 of your supplemental report, Exhibit 205, and in the first full paragraph on that page, you refer to further investigation with Mr. Martens and Mr. Kitchen, do you see that?	7 A	No, I did not specifically discuss with Neil the actual mechanics of the sharing of profits.
7 A	Yes.	8 Q	I'm not talking about necessarily the mechanics with you, how about the assumption that Gaiman would have been in a position of Todd McFarlane as the assignee of his rights, did you discuss that with Neil?
8 Q	And that's I believe where you discuss Mr. Gaiman's ability to publish an Angela one off under an arrangement with another publisher as if he was in the same position as the publisher, is that right?	9	
9 A	Correct.	10	
		114	
1 Q	Now, the second to last sentence in that paragraph starts with the words, "Since Gaiman," do you see that?	1 A	We probably didn't use the word assignee, we probably discussed in our conversation that Neil would have the ability to go to these other companies with the right to keep that particular revenue from that project when he went to DC or Marvel to do a Batman crossover or to do a Phoenix crossover.
2 A	Yes.	2	But the way Neil described it was basically this is a character that Neil gets to take to a different comic publisher and assert his rights with that character.
3 Q	Could you read that sentence to me, please.	3	
4 A	"Since Gaiman is similar to a publisher (as the assignee of McFarlane's rights to the use of the character), Gaiman could have negotiated a 50/50 sharing of profits with Marvel Comics."	4	
5 Q	What did you mean, and I'm not asking for a legal definition of the term, I'm asking what you meant when you used the words, "As the assignee of McFarlane's rights to the use of the character," in that sentence?	5	
6 A	My understanding is that Angela still is part of McFarlane or Todd McFarlane Productions and that the use or one off concept is Todd allowing or giving the right or the assignment of that right to use that character with another publisher.	6	
7 Q	So it's your understanding that in Exhibit 19 where Neil discusses the exchange of characters and discusses the one offs, that it is in that term that Todd McFarlane assigned his rights to Neil Gaiman to the use of the Angela character, is that correct?	7	
8 A	MS. EADS: Objection to form.	8	MS. EADS: Objection as to form.
9 Q	MS. EADS: Objection to form.	9	THE WITNESS: Read back the question.
10 Q	You may answer.	10	(Reporter reads back previous question)

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1 On page 9 of Exhibit 205, on schedule B-17, the
 2 maximum Gaiman compensation, you have the figure
 3 \$95,700, correct?
 4 A Correct.

5 Q And then on B-19 for the Medieval Spawn figure, you
 6 have the figure of \$67,700 for the maximum
 7 compensation?

8 A Correct.

9 Q And those are based on the 50/50 sharing of profits
 10 model, correct?

11 A Correct.

12 Q My question is this, is your conclusion as to the
 13 amount of those, the amount of that compensation,
 14 dependent upon your assumption that Gaiman is the
 15 assignee or is standing in the shoes, basically, of
 16 Mr. McFarlane as a publisher in these negotiations?

17 MS. EADS: Objection as to form.

18 A In a nonlegal sense, that's my understanding of the
 19 agreement between the parties.

20 Q I understand that, I'm not asking for your
 21 understanding of the agreement of the parties here,
 22 but I'm just making sure I have the building blocks to
 23 the dollar figures you're concluding in the maximum
 24 compensation on the one offs.

25 And so really what my question is, simply, is

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1 respect to the right to use the Angela and Medieval
 2 Spawn characters?

3 A Yes, in an economic sense, yes.

4 Q What do you mean by an economic sense?

5 A Well, I'm not opining to the legal sense of assignee
 6 or making a characterization or opinion of assignee,
 7 only in that he would share equally or share in those
 8 economic sums under that arrangement with whomever he
 9 negotiated.

10 Q And as far as you -- in an economic sense, in your own
 11 calculations, a necessary building block to arriving
 12 at the maximum Gaiman compensation under schedules
 13 B-17 through B-20 is the underlying assumption that
 14 Gaiman is standing in the shoes of or is the assignee
 15 of Todd McFarlane with respect to the right to use the
 16 characters of Angela and Medieval Spawn, correct?

17 A Yes.

18 Q Let's move on to the schedules that you provided to us
 19 in Exhibit 204, and also I think we'll have to refer a
 20 little bit back and forth to the attachments in your
 21 supplemental report, to the extent that they may be
 22 different than those in Exhibit 204, okay?

23 A Okay.

24 Q So let's start with summary of royalties for toys
 25 which I believe is page 8 of 14 in Exhibit 205.

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1 your conclusion as to the maximum Gaiman compensation
 2 reflected in schedules B-17, B-18, B-19 and B-20 all
 3 dependent upon the operation of the 50/50 sharing of
 4 profits method that you describe on page 3 of Exhibit
 5 205?

6 A Read that back.

7 Q Let me see if I can ask it a little cleaner, I'm
 8 sorry. You have a maximum Gaiman compensation
 9 calculated on schedules B-17, B-18, B-19 and B-20,
 10 correct?

11 A Correct.

12 Q My question is, are those maximum compensation totals
 13 reflected on schedules B-17 through B-20 dependent
 14 upon the operation of this 50/50 sharing of profits
 15 method or business model that you described on page 3
 16 of Exhibit 205?

17 A It would be pages -- well, all the pages of my Exhibit
 18 2 through 4, but yes, that's a true statement.

19 Q You're right, not just limited to page 3, because
 20 that's the Angela only, but on your supplemental
 21 report, okay, so now my next question is, is the
 22 operation of the 50/50 sharing of profits business
 23 model reflected in your supplemental report dependent
 24 on your assumption that Gaiman is standing in the
 25 shoes of or is the assignee of Todd McFarlane with

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1 A Okay.

2 Q And the way I look at the first page of Exhibit 204,
 3 which is also summary of royalties, there's been no
 4 change in your supplemental report on this summary, is
 5 that correct?

6 A Correct.

7 Q So we'll work from the latter one. Beginning with
 8 schedule A-1, and actually, let's start with the
 9 general question so that I understand how your
 10 summaries work. In attachment table I, page 5 of
 11 Exhibit 205, you state your ultimate conclusion as to
 12 the minimum and maximum Gaiman compensation that's due
 13 in this case, correct?

14 A Yes.

15 Q And is it accurate to say that your calculations for
 16 the minimum and maximum Gaiman compensation reflected
 17 on attachment table I of your supplemental report are
 18 based on the assumption that the four letters
 19 exchanged between Neil Gaiman and Todd McFarlane in
 20 May and July of 1997 formed a binding contract?

21 A Yes.

22 Q And is it also accurate to say that your conclusions
 23 regarding the minimum and maximum Gaiman compensation
 24 reflected on attachment table I of Exhibit 205 are
 25 based on the assumption that the four letters

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1	exchanged between Todd McFarlane and Neil Gaiman in		1 A Well, if you go to attachment 4, page 8 of 14 in	
2	May and July of 1997 contain all of the terms of the		2 Exhibit 205.	
3	contract between those two parties?		3 Q Okay, and I see at the bottom of attachment table IV,	
4	MS. EADS: Objection as to form.		4 page 8 of Exhibit 205 there is a tentative balance due	
5	THE WITNESS: Can you read that		5 in the minimum Gaiman royalty column and the maximum	
6	back.		6 Gaiman royalty column, is that correct?	
7	(Reporter reads back previous question)		7 A Yes.	
8	A That is the basic framework that I have made the		8 Q And up above that, two lines above that there's a	
9	assumption to do page 8, table IV of Exhibit 205.		9 total royalties due on toys and there's \$46,000 and	
10	Q And would that be true for attachment table I of		10 \$78,000 and minimum to maximum Gaiman royalties,	
11	Exhibit 205, which is the total minimum and maximum		11 correct?	
12	compensation?		12 A Correct.	
13	A That information that rolls up to table I, yes.		13 Q And those two figures under the line, total royalties	
14	Q And really what I just want to make sure is that --		14 due on toys, are those the figures now that you have	
15	and my final question is this, in making calculations		15 put on your summary and attached as table I?	
16	that ultimately were -- strike that. In arriving at		16 A Yes, on page 5 of 14?	
17	the minimum and maximum Gaiman compensation reflected		17 Q Yes.	
18	on attachment table I of your supplemental report, did		18 A Yes.	
19	you rely solely on the terms listed in Exhibit 2 for		19 Q And if we look at page 9 of Exhibit 205 which is	
20	calculating royalty rates and royalty percentages?		20 attachment table V, summary of compensation for	
21	A Exhibit 2 is the Egger?		21 comics?	
22	Q Correct, the May 5 letter from Neil to Todd.		22 A Yes.	
23	A And this document is -- I just want to make sure I		23 Q I see three lines from the bottom, you have a total	
24	have all the documents.		24 compensation due on comics, minimum Gaiman	
25	Q Okay.		25 compensation is \$388,000 plus and the maximum Gaiman	
		122		124
1	A Yes.		1 compensation is \$493,000 plus, do you see that?	
2	Q Now, is it true that attachment table I which reflects		2 A Yes.	
3	the range of compensation earned and balance due		3 Q Are those the same numbers that are reflected in the	
4	represent -- strike that. In attachment table I		4 second line of attachment table I under the line	
5	reflecting the range of compensation earned and		5 comics?	
6	balance due, you have various total minimum and total		6 A Yes.	
7	maximum compensation for toys, comics, media, et		7 Q And then attachment table VI works the same way with	
8	cetera, do you see that?		8 respect to media, is that correct?	
9	A Yes.		9 A Yes.	
10	Q And my question is this, is each one of those total		10 Q Is it your statement that the total royalties -- let's	
11	figures, the minimum and the maximum compensation for		11 look at attachment table IV, the total royalties due	
12	each category, does that appear on some other part of		12 on toys, minimum and maximum Gaiman royalties. Those	
13	your report or schedules?		13 figures that appear in the line item on attachment	
14	A They are in more detail in Exhibit 204 by category and		14 table I, is it your opinion in this case that those	
15	in Exhibit 205, we have each of the categories.		15 are royalties due under the terms of the contract as	
16	Q I guess what I want to get at is I want to work back		16 you've used that term reflected in the May 5 letter or	
17	from attachment table I to each of the figures that's		17 Exhibit 2?	
18	included in there and I want you to show me -- let's		18 A Yes, this is all based upon the framework agreement, I	
19	take, for example, the toys attachment table I. You		19 don't know if I want to use the word contract.	
20	have a minimum Gaiman compensation of \$46,684.76 and a		20 Q Well, let's do this, let's make it easier on ourselves	
21	maximum Gaiman compensation of \$78,172.61, do you see		21 so we don't have to have such long winded questions	
22	that?		22 and answers, because I think we're talking about the	
23	A Yes.		23 same thing and I want to make sure that you're	
24	Q Tell me where either in later attachment tables or		24 comfortable and your counsel is comfortable with my	
25	schedules I can find those figures.		25 question.	

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	125	1 Would you agree with me that for purposes of all 2 of your calculations on these schedules and 3 supplemental reports and attachments, that you relied 4 on the terms set forth in Exhibit 2? 5 A I relied on that to be the basic framework, yes. 6 Q And when you say in your main report on page 4, 7 Exhibit 203 under the subheading assignment, that you 8 were asked to determine the economic sums due Gaiman 9 under the terms of the agreement, you're also 10 referring to the terms set forth in Exhibit 2, 11 correct? 12 A Two, and I guess I would have to caveat it with 19. 13 Q To the extent that 19 adds a glass on, too, we just 14 want to make sure that we don't have to be back to 15 Exhibit 2 or 19. 16 A I guess collectively that I would like to say two, 19 17 and 20 were the basis or framework that really results 18 in how we did the calculations, other than additional 19 notations that may be on an individual exhibit. 20 Q And let's for these purposes, let's refer to that, if 21 this term is agreeable to you, as to -- the alleged 22 1997 contract. Can we use that term, and if I use 23 that term then I'm referring to that exchange of 24 letters which you've just identified as that range of 25 deposition exhibits and which is included in your	127	1 reflected on these documents is the amount due under 2 the terms of the alleged 1997 contract? 3 A Yes, using that framework. 4 Q Let's look at schedule A-1. On Exhibit 204, all of 5 the schedules are individually contained in Exhibit 6 204 with the exception of B-17 through 20, which are 7 in the supplemental report, we'll get to those later. 8 Do you have schedule A-1 in front of you? 9 A Yes, I do. 10 Q On attachment table IV, page 8 of Exhibit 205, you 11 reference the Angela figure and then you have a 12 minimum Gaiman royalty of \$20,154.09, do you see that? 13 MS. EADS: Could I -- 14 A We're a little slow, Pete, because you're going 15 through six different tables. 16 Q I'm sorry, here's what I want to do here, just going 17 to attachment table IV right now, summary of royalties 18 for toys, that's page 8 of Exhibit 205. 19 A Fair enough. 20 Q And that lists schedule A-1 through A-13, correct? 21 A Correct. 22 Q So in discussing these schedules, keep that attachment 23 table IV with you for cross-reference. 24 A Correct. 25 Q Now, I want to understand on your schedule A-1, point
	126	1 bullet points contained on page 3 of your Exhibit 2 203? 3 I'm just trying to come up with a term we can use 4 to short circuit some of this stuff. 5 A That would be fine. 6 Q So then my question is, is it your testimony that the 7 total royalties due on toys contained in attachment 8 table IV and reflected in the line item on attachment 9 table I under toys is your calculation of the 10 royalties due on toys under the alleged 1997 contract? 11 A Yes. 12 Q And then the same with attachment table V, is it your 13 testimony that the total compensation due on comics 14 which is reflected in the minimum and maximum Gaiman 15 compensation and then contained again in the line item 16 under comics on attachment table I, that that is the 17 total compensation due on comics under the terms of 18 the alleged 1997 contract? 19 A Yes. 20 Q And then the same question with respect to attachment 21 table VI regarding the summary of royalties for media, 22 the total royalties due on media which is reflected in 23 the minimum and maximum Gaiman royalty and then also 24 contained in the line item attachment table I, is it 25 your testimony that the total royalties due on media	126	1 to me where on schedule A-1 are the figures that 2 ultimately make their way into attachment table IV 3 with minimum Gaiman royalties and maximum Gaiman 4 royalties. 5 A Well, if you go to the amount due line under the 6 minimum column, it's \$20,154.09 and that corresponds 7 to attachment table IV under the minimum. 8 Q And then the same with the maximum of \$40,308? 9 A Yes. 10 Q And you're referring on schedule A-1 to a gray box 11 that says amount due, correct? 12 A Correct. 13 Q And it's your testimony that that amount due is the 14 amount due under the terms of the alleged 1997 15 agreement for Angela figures, correct? 16 A Correct. 17 Q And we discussed at length earlier today the two 18 different royalty rates, the five percent and ten 19 percent, resulting in a minimum and maximum royalty, 20 do you recall that testimony earlier today regarding 21 toys? 22 A Yes. 23 Q Where on schedule A-1 are those different royalty 24 rates reflected? 25 A It's reflected in the minimum column and the maximum

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1	column.	1	character, he would have gotten one-half of the 15
2	Q Point to me where that is, under what line item, is	2	percent royalty rate.
3	that publisher's royalty rate?	3	Q And rather than reflect that as a 7.5 percent royalty
4	A Correct.	4	rate, you simply showed reflected on schedule A-2 as a
5	Q Note 2 says per TMP contract, TMP royalties would be	5	15 percent royalty rate divided or multiplied by 50
6	five percent of gross sales and then note 3, analysis	6	percent, correct?
7	also includes TMP royalty based on a ten percent	7	A Correct, it was easier for keeping the template for
8	publisher's royalty rate?	8	all the schedules of tables consistent, that's all.
9	A Correct.	9	Q Schedule A-3, do you have an amount due in gray,
10	Q And schedule A-1 in those two different royalty	10	minimum of \$949 and a maximum of \$1899, do you see
11	calculations, the only difference between the minimum	11	that?
12	royalty and the maximum royalty is the application of	12	A Correct.
13	this additional five percent of publisher's royalty,	13	Q My conversion of schedule A-3 does not contain any
14	is that correct?	14	calculations above that amount due under the maximum
15	A Correct.	15	royalty column, why is that?
16	Q And your reasons for using a ten percent publisher's	16	A As you read footnote 2 next to the amount due, we
17	royalty rate here are all set forth in your report and	17	assumed the royalty rate on the maximum to be two
18	contained in this discussion we had earlier in your	18	times the minimum, has been consistent with A-1 and
19	deposition, correct?	19	A-2 so far.
20	A Correct.	20	Q So A-3 really has the exact same calculations, it just
21	Q On schedule A-2 for Medieval Spawn figures, there's	21	doesn't have the predicate calculations of the
22	also a minimum and a maximum amount due, correct?	22	publisher's royalty rate of five percent in the
23	A Correct.	23	minimum column and ten percent in the maximum column,
24	Q Contained in the gray box in bold print on schedule	24	is that correct?
25	A-2 and the minimum amount is \$10,384 and the maximum	25	A Correct, only because I couldn't opine or know if the
	130		132
1	amount is \$20,768, correct?	1	gross revenue numbers were correct, since we still
2	A Correct.	2	have not been provided that information. So according
3	Q And those are reflected in the second line item,	3	to the accounting people at McFarlane, they couldn't
4	Medieval Spawn figures on attachment table IV,	4	come up with this information on this particular
5	correct?	5	Angela figure and so we had to use what was in his
6	A Correct.	6	royalty sheet as the publisher's royalty and had just
7	Q And, again, you have publisher's royalty rate	7	to make the assumption that that's our net revenue to
8	calculated at five percent and also at ten percent,	8	TMP that we applied the royalty rate to.
9	correct?	9	Q So your reading in schedule A-3, if I read schedule
10	A Correct.	10	A-3 and I read publisher's royalty in the first
11	Q And my same questions with respect to schedule A-1, is	11	column, \$6330.10, you're making the assumption that
12	the basis for your ten percent royalty calculation	12	that is the same calculation or as close as possible
13	contained in your expert report and in your deposition	13	as you can to the calculations in schedule A-2
14	testimony earlier today?	14	reflecting five percent of the gross revenues or five
15	THE WITNESS: Can you read back	15	percent of the net revenues or five percent of some
16	that question? I got lost.	16	figures?
17	(Reporter reads back previous question)	17	A Right, I can only rely on that information, because
18	A Yes.	18	there's not good data to make the same calculation as
19	Q I also see you have a line item in schedule A-2 called	19	I did in A-1 and A-2.
20	derivative character factor, could you explain that to	20	Q I understand. In Schedule A, four appears blank and
21	me, please?	21	is that because it's your understanding that there
22	A Because Medieval Spawn is a derivative of Spawn, the	22	were no Cogliostro figures made as of the date --
23	discussions we had with Neil and his counsel was that	23	after the exchange date?
24	Neil was not to get the normal royalty rate for that	24	A It was not until after the exchange date, based on the
25	derivative character, so when he had that derivative	25	final information we received.

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	133	1 Q And when you refer to the exchange date, what do you 2 mean there? 3 A August 4, 1997. 4 Q And that is reflected in your assumption that all of 5 your calculations are based on the terms of the 6 alleged 1997 contract, correct? 7 A Correct. Can we take a quick five-minute break? 8 MR. SALSICH: Absolutely, that's 9 fine. 10 (A short recess is taken) 11 MR. SALSICH: Gina, if you have 12 that royalty agreement we talked about marking earlier. 13 (Exhibit 206 is marked for identification) 14 MS. CARTER: We marked it Exhibit 15 206. 16 MR. SALSICH: Just let the record 17 reflect that we've marked as Exhibit 206 the 18 royalty agreement between the Todd McFarlane 19 Productions, Inc. and TMP International that we 20 spent some time discussing in the deposition 21 earlier today and that document is marked 22 confidential and it bears Bates number TM01237 23 through TM01248 inclusive. 24 Q Mr. Caven, can you take a quick look at Exhibit 206	135
1	134	1 for me, please. 2 A Yes. 3 Q And do you agree with me that that is the royalty 4 agreement that we discussed earlier today and the 5 pages of which you referred to in your expert witness report? 6 A Yes. 7 Q Let's look at schedule A-9. 8 A Yes. 9 Q And schedule A-10 and schedule A-11, I have the same 10 questions on all three. On each of those schedules, 11 you show a line item that has total number of cards 12 that include artwork of Angela, do you see that? 13 A Yes. 14 Q And on schedule A-9, it indicates that there are 17 15 out of the 109 cards that depict Angela, on schedule 16 A-10, it looks like 10.5 out of 177? 17 A Yes. 18 Q And on schedule A-11, it looks like two out of 18, is 19 that right? 20 A Yes. 21 Q And my question for you is the same on all three 22 schedules, where did you get that number? 23 A TM00521. 24 Q And is that the same document that is contained in the	136
1		1 and July of 1997 letters between Todd and Neil? 2 A Correct, that there is no discussion that if there is 3 a weighting, because one character is more extensive 4 than the other subject character, there's no 5 discussion of that whatsoever in these 6 correspondences. 7 And we took the position that there would not be 8 a weighting as Todd did in his calculation in TM00521 9 through 00523. 10 Q And that you really answered that my second question, 11 when you use the word contract there, you're referring 12 to what we've decided to call the alleged 1997 13 contract, correct? 14 A Correct. 15 Q On schedule A-12, you have a line item of conversion 16 for U.S. dollars to Canadian dollars, correct? 17 A Correct. 18 Q You used a conversion rate of 0.275, at least that's 19 what I read on there? 20 A Correct. 21 Q Can you tell me how you arrived on that conversion rate? 22 A I forget what website we went to, but it was on the internet. We looked at the conversion rate back in 1997 at that time.	
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<p>1 Q So you went to an internet site that contained 2 historical data regarding conversion between Canadian 3 dollars and United States dollars in 1997?</p> <p>4 A Correct.</p> <p>5 Q Was that a conversion rate, an average conversion rate 6 or the entire year or did you focus on August of 1997?</p> <p>7 A August of -- August 4, actually.</p> <p>8 Q Do you have any notes or any documents that would 9 support your research on this issue on the internet?</p> <p>10 A Yes, you have made a copy this afternoon and it's 11 contained in those copies you made.</p> <p>12 Q Is that a printout from the website?</p> <p>13 A Correct.</p> <p>14 Q Can you tell me what schedule A-14 is?</p> <p>15 A A-14 is attempting to consolidate the requests for 16 information on McFarlane toy sales as noted by the 17 exhibits below of TM01981, TM02013, TM2014, TM2367 and 18 TM2639, and then to prorate that information between 19 the characters of Angela and Medieval Spawn.</p> <p>20 Q So in some of the -- we don't need to spend a lot of 21 time on this, but just so I understand it correctly, 22 did you base all of your calculations contained on 23 schedule A-14 and I guess the same with schedule A-15, 24 which is a later -- from 1998 to 2001, correct, 25 schedule A-15?</p>	<p>137</p> <p>1 they didn't have old copies of the software, so the 2 data was very difficult for them to extract. 3 So we relied on, I guess, more A-14 is going to 4 be more informational, but not conclusive and we 5 relied on then A-15 to augment, which is line two, so 6 to speak, of A-1 and A-2.</p> <p>7 Q Okay, I follow that.</p> <p>8 A Actually, just for A-1. A-2, we used the \$2.7 million 9 in gross revenue and yet on A-14, the new data shows 10 it's \$2.8 million, so we still went back with the old 11 data, even though the new data may support a higher 12 number. We went conservative on that assumption 13 there.</p> <p>14 Q So for purposes of A-14 and A-15, is it accurate to 15 say that those are primarily informational, because we 16 can rely on the -- and you have relied on schedules 17 A-1 and A-2 and whatever supporting document is 18 identified therein in arriving at your minimum and 19 maximum toy royalties for Angela and Medieval Spawn, 20 is that correct?</p> <p>21 A That's correct, we couldn't reconcile from the 22 company's records that they were providing to an 23 accurate number.</p> <p>24 Q Is there anything else we need to know about schedules 25 A-14 and A-15 or any other way in which you have used</p>
<p>1 A A-15 is from 1998 to 2001.</p> <p>2 Q Between the combination of schedules A-14 and A-15, it 3 appears that that is an attempt to summarize the toy 4 sales on those Angela and Medieval Spawn characters 5 from 1994 up through 2001, is that correct?</p> <p>6 A Can you read back the question.</p> <p>7 Q I can make it simpler, I just want to make sure if you 8 read schedule A-14 and A-15 to be an attempt to 9 summarize the total sales for the Angela and Medieval 10 Spawn toys between 1994 and 2001.</p> <p>11 A We compiled from the information we received on 12 McFarlane sales between '94 and 2001. However, the 13 information in A-14 for Angela and Medieval Spawn do 14 not carry back to A-1 and A-2, largely because the 15 information we were getting, we couldn't reconcile to 16 the original documents prepared by McFarlane. 17 And we went with the -- as footnote one says in 18 A-1 and footnote one in A-2, we used the gross 19 revenues that were compiled back in July of '97 as 20 being more accurate than the latest release of 21 information, largely because of testimony by Julaine 22 or other requests were not provided, that there was 23 some accounting problems extracting the data out of 24 the old Quick Books or Quicken files to go from '97 to 25 '98 to '99 or even back into the historical, because</p>	<p>138</p> <p>1 the information on those schedules?</p> <p>2 A No.</p> <p>3 Q Now, if you would turn in Exhibit 205, the 4 supplemental report, to attachment table V which is 5 the summary of compensation for comics?</p> <p>6 A Correct.</p> <p>7 Q And it reflects supporting schedules B-1 through B-20, 8 correct?</p> <p>9 A Correct.</p> <p>10 Q And it contains a minimum Gaiman compensation and 11 maximum Gaiman compensation column for various comic 12 book issues, correct?</p> <p>13 A Correct.</p> <p>14 Q And is it accurate to say that each supporting 15 schedule references compensation due for just one 16 particular comic book issue, in other words, you 17 haven't, with the exception of the other appearances, 18 catalogs or schedules you've broken out, each 19 particular comic book issue or trade paperback has its 20 own supporting schedule, correct?</p> <p>21 A Yes, for B-1 through B-11.</p> <p>22 Q Okay. Is it also true that the calculations -- let's 23 look at schedule B-1, we'll do it one by one. 24 Schedule B-1 reflects an amount due for the comic book 25 issue Angela number one, is that correct?</p>

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1 A Correct.		1 Q You may answer.	
2 Q And you have \$27,851.04 and that corresponds to both		2 A As I stated, it is not specifically outlined in the	
3 the minimum and maximum Gaiman compensation on		3 alleged agreement.	
4 attachment table V, correct?		4 Q Now, if we take away the information you received from	
5 A Correct.		5 Neil Gaiman, Denis Kitchen and Mike Martens as to	
6 Q And the calculations that you made on schedule B-1, do		6 industry practice and we just look at the terms of the	
7 those reflect the terms as you understand them of the		7 1997 contract as reflected in the letters we've	
8 letters that we've agreed to call the alleged 1997		8 identified as Exhibit 2, 19 and 20, and you relied on	
9 contract?		9 in your expert report, if we just look at those terms,	
10 A Yes.		10 is the higher line item total royalties per above, is	
11 Q On schedule B-2, there's an amount of \$26,342.91 for		11 that the accurate amount due under the terms of the	
12 minimum and maximum Gaiman compensation with respect		12 1997 contract? Schedule B indicates that that would	
13 to Angela issue number two, correct?		13 be \$13,645.53.	
14 A Correct.		14 MS. EADS: Objection as to form.	
15 Q And is that also an amount due based on your		15 Q Did you understand my question?	
16 understanding of the terms set forth in the alleged		16 A Yes, I'm reviewing a few other pieces of paper to the	
17 1997 contract?		17 alleged document, just to -- under your hypothetical,	
18 A Correct.		18 that would be the hypothetical royalties calculated	
19 Q Schedule B-3, that shows an amount due of \$16,987.64		19 under the --	
20 and you've carried that over into line item for Angela		20 Q I wasn't asking about a hypothetical, though, here.	
21 number three on attachment table V for both a minimum		21 A Well, you have made it a hypothetical, because you've	
22 and maximum Gaiman compensation, correct?		22 removed the assumption that I had talked to three	
23 A Correct.		23 people who said this was industry practice.	
24 Q And does that amount due reflect your understanding of		24 Q Okay. Well, let's look at this, I see what you're	
25 the terms of the alleged 1997 contract?		25 saying, let me see if I can do it another way, because	
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1 A Yes, with the additional supplemental discussions with		1 I don't want it to appear hypothetical. I'd like to	
2 Gaiman, Martens and I guess Kitchen, that it is common		2 simply refer to the documents that we've identified as	
3 when the advance or script fee and advanced royalty		3 the alleged 1997 contract.	
4 fee are paid, those are the payments even if the		4 And I'm looking at schedule B-1 and schedule B-2	
5 royalties under any sort of calculation are less.		5 and I see line items for units sold, cover price,	
6 Q Let me make sure I understand that. Is it your		6 creator royalty rate, creator royalty amount, writer's	
7 testimony that nothing in the terms of the alleged		7 royalty rate, writer's royalty amount and total	
8 1997 contract between Neil and Todd as reflected in		8 royalties per above, do you see that on schedule B-1,	
9 the letters that we've identified as Exhibit 2, 19 and		9 did I leave anything out?	
10 20 and that you've relied on in your expert report,		10 A B-1 or B-3?	
11 nothing in that alleged 1997 contract tells you to		11 Q B-1, please.	
12 count the greater of the royalties earned or the		12 A Yes, I'm looking at B-1.	
13 payments received as advances, is that correct?		13 Q Did I leave anything out in listing the various line	
14 A Correct.		14 items there in your calculation?	
15 Q So you take that -- you make that assumption and		15 A You have creator royalty rate and writer royalty rate.	
16 you've identified that as note 2 in your schedule B-3,		16 Q Right, and then amounts for each of those as well as	
17 am I reading that correctly?		17 the units sold and a cover price?	
18 A Yes.		18 A Correct.	
19 Q And you make that assumption based entirely on		19 Q And that leaves me with total royalties per above of	
20 discussions you had with Neil Gaiman, Denis Kitchen		20 \$27,851.04 and then you identified that as simply the	
21 and Michael Martens, correct?		21 amount due, correct?	
22 A Correct, that it was kind of an industry practice.		22 A Correct.	
23 Q But it's not reflected in the contract, in the alleged		23 Q And you told me that that calculation was based on the	
24 1997 contract, as you've reviewed it, is that correct?		24 terms of the alleged 1997 contract, right?	
25 MS. EADS: Objection as to form.		25 A Those are outlined specifically in the contract, yes.	

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1 Q Now, B-2 looks, to me, I know the numbers are 2 different because the units sold are different, but 3 the calculations appear to be identical and the line 4 items appear to be identical as they are in B-1, 5 correct?		1 that the amount due would be the greater of the 2 royalties earned from the advances from McFarlane, is 3 that correct?	
6 A Correct.		4 MS. EADS: Objection as to form.	
7 Q And B-3, they're also identical up until -- down to 8 the line that says total royalties per above, correct?		5 Q In other words, that note 2 comes, as you said, from 6 Neil Gaiman, Denis Kitchen and Mike Martens, correct?	
9 A Correct.		7 A Correct, as well as this particular Spawn 9, it is my 8 understanding that Todd and Neil, mainly Todd, said I 9 will pay you, no matter what, for Spawn 9 \$100,000, 10 because that's what I'm doing.	
10 Q Now, I understand that you've testified that you took 11 the larger of the amounts paid by Mr. McFarlane as 12 advances and royalty fees and called that the amount 13 due, I understand that. My question is, doesn't the 14 total royalties per above line item on schedule B-3, 15 which is \$13,645.53, doesn't that equal the amount due 16 if you rely solely on the terms of the alleged 1997 17 contract?		11 Q I understand whatever Todd and Neil may have said back 12 in 1992 or done back in 1992, it's my understanding 13 that you were not asked to make a calculation based on 14 that, but you were asked to make a calculation based 15 on the alleged 1997 contract, correct?	
18 MS. EADS: Objection as to form.		16 A Correct, so I'm illustrating what the actual royalties 17 would have been based upon the information that we 18 received on total print run and print units sold.	
19 Q You may answer.		19 Q And that would be, again, that \$68,943.50 which has a 20 double line under it, under the line item total 21 royalties per above, correct?	
20 A The framework or the alleged contract doesn't speak to 21 an industry practice.		22 A Correct, that's assuming that the print run and units 23 sold, you know, are accurate information.	
22 Q I understand that and that's why I just want to leave 23 that aside. I'm not saying -- I'm not challenging 24 your addition, I understand how you added that in and 25 where you got it from, I'm just trying to understand		24 Q I understand. And really, the print run is 25 meaningless, isn't it, you calculated the royalties	
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1 the calculation under the contract that you started 2 with.		1 based on units sold, correct?	
3 Would you agree with me that if it turned out 4 that the amounts you calculated under the 1997 5 contract, if that line that's indicated in total 6 royalties per above, if that line was greater than the 7 amount paid by Mr. McFarlane, then you would call that 8 the amount due, correct?		2 A Correct.	
9 A Well, in Exhibit 1 and Exhibit 2, we had the same 10 script or payments and since they were lower than the 11 amount due, we omitted them within the context of this 12 exhibit when we were doing our final edit, because the 13 higher amount was what was calculated per unit.		3 Q Also in schedule B-5, I notice that you have a creator 4 royalty rate and a creator royalty amount calculated 5 for Mr. Gaiman with respect to Spawn issue 9, correct?	
14 Q And I just want to focus on the amount calculated, not 15 the amount paid, but the amount you calculated based 16 on reading the alleged 1997 contract. What amount did 17 you calculate based on the terms of the 1997 contract 18 only on schedule B-3?		6 A Correct.	
19 A We calculated \$13,645.53.		7 Q Why did you include a creator royalty rate in addition 8 to writer royalty rate for Spawn 9?	
20 Q Schedule B-5, that appears to have the same note 2 as 21 schedule B-3, correct?		9 A It is my understanding that there are characters that 10 were created, such as Angela, in Spawn 9, so that we 11 actually did the calculation under a creator royalty 12 as well.	
22 A Correct.		13 Q I'm not sure I followed you there. Could you explain 14 it to me again?	
23 Q And, again, is it your testimony that the alleged 1997 24 contract, the written letters exchanged by Neil and 25 Todd in 1997, did not contain any provision providing		15 A Well, to the context that there's the Angela character 16 that was developed within this particular production, 17 we made this calculation with the creator royalty in 18 there.	
		19 Q Did you do that based on your earlier testimony that 20 you decided that extensive use of the character would 21 be any time the character appeared on more than five 22 pages of an issue?	
		23 A Yes, that kind of goes to that context. I don't know 24 if we specifically analyzed Spawn 9, as to how many 25 pages, but that Angela was a page or character.	

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1	Q So who told you to include that, was that Neil?		A Correct.
2	A It would have been within a joint conversation with	3	Q That's not really my question. I think we're clear,
3	Neil and his attorney and I don't recall at this time	4	but I want to make sure I understand. Just based on
4	who specifically stated that, but it was concluded out	5	the terms of the alleged 1997 contract, though, based
5	of that discussion that we should be treating the	6	on the total units sold, you calculate a figure of
6	creator royalty as part of the calculation.		\$68,943.50, correct?
7	Q Did you look at any DC Comics contracts to see whether	8	A Correct.
8	that would be appropriate?	9	Q And your basis for adding a creator royalty rate and a
9	A No, I did not add that in, no. I did not review that	10	creator royalty amount for Spawn issue 9 is that you
10	DC contract for that issue.	11	had a discussion between yourself and Neil Gaiman and
11	Q Did you -- you testified a few minutes ago about what	12	his lawyers that that would be appropriate, because
12	Neil Gaiman and Denis Kitchen and Mike Martens told	13	Angela was created in that comic book, is that
13	you about the industry standard of the greater the	14	correct?
14	royalties earned or the advances paid, do you recall		A That's my understanding, yes.
15	stating that?	15	Q You did not independently verify whether that was
16	A Yes.	16	something that would be done in any of Neil's other
17	Q I want to make sure I understand that. What exactly	17	contracts, including any contracts with DC Comics,
18	did Neil Gaiman himself tell you that led you to	18	correct?
19	conclude that you should calculate the amount due as	19	A No, I did not review any contracts. I didn't think it
20	the greater of the amount paid or the amount which you	20	was professionally necessary.
21	calculated?	21	Q On schedule B-6, you also included a creator royalty
22	A It's pretty consistent with everybody's discussion and	22	rate and creator royalty amount for Spawn issue number
23	that is that as a writer/creator, when you work on a	23	26, correct?
24	project, the advance rate that is negotiated between		A Correct.
25	the parties is then kept 100 percent by that	25	Q Again, I'd ask you why you did that with Spawn issue
1	writer/creator.	150	1 26.
2	Q So let me try to understand that. Is it your	2	A Once again, I don't recall if Spawn 26 is where
3	statement simply that because Neil got paid more in	3	Cogliostro comes in.
4	advances for Spawn 9, for example, than ultimately he	4	Q I can tell you that it's not.
5	would have earned under a royalty calculation in the	5	A I'd have to check my notes, but once again, that would
6	alleged '97 contract, simply that he gets to keep that	6	have been because of the major character being Angela,
7	extra money because he was paid that in advance?	7	is the only thing that I can recall.
8	A Yes, that's kind of the -- as I understand from	8	Q If you look right above the creator royalty rate on
9	Martens and Kitchen, they specifically said that's	9	your schedule B-6, you've got an allocation as Gaiman
10	kind of the risk for the publisher.	10	contribution based on number pages, based on Gaiman's
11	Q So that may be an industry standard that the writer	11	script, based on total number of pages, do you see
12	gets to keep that money, I understand that, but what I	12	that?
13	want to find out is are you testifying that now,		A Yes.
14	sitting here, reviewing the terms of the contract	14	Q If I'm reading that correctly, it appears that Gaiman
15	based on royalties, that you would conclude that he's	15	contributed three out of the 24 pages in Spawn 26, is
16	contractually entitled to an amount equal to \$100,000?	16	that right?
17	MS. EADS: Objection as to form.		A Correct.
18	A Well, under the alleged contract, that specifically is	18	Q Now, before you defined extensive use, you guys came
19	not addressed, and, in fact, you know, the question of	19	up with a figure of five pages out of 20 or in this
20	adding in these advance payments is -- to the context	20	case, I guess 24, as something that would be extensive
21	that Todd made his statement, it is my understanding	21	use and trigger the creator's royalty rate, correct?
22	to Neil, it's \$100,000 no matter what the royalty		MS. EADS: Objection as to form.
23	calculation would come to.	23	A Correct.
24	Q The \$100,000 that he got paid and the \$100,000 that he	24	Q You've got here Gaiman only contributed three pages
25	got to keep, correct?	25	out of 24, so why do we have the creator royalty rate

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	153		155
1 here?		1 he did get a creator royalty and then when you	
2 A I think it's a difference of appearance of a character		2 actually read Exhibit 2 of the alleged contract,	
3 as opposed to contribution of writing.		3 instead of having a cutoff at 100,000 copies, the	
4 Q So any time -- so if I understand your definition of		4 cutoff doesn't apply here anyway, but it's a shortcut	
5 extensive use, any time the character appears on a		5 that says anything below 100,000 copies is still at	
6 page, whether it says anything or does anything or		6 the .5 under a creator royalty, where under the	
7 advances the story at all, if it appears on the page		7 collected or trade paperback, it's .8, we used the .8.	
8 visually, you count that page and if you get up to		8 Q I'm just trying to -- I'm not necessarily at this	
9 five counted pages, that's extensive use in your		9 point asking you a question about whether .5 or .8 is	
10 definition and Neil gets a creator royalty on sales of		10 the appropriate percentage for creator royalty, I'm	
11 that comic book, is that correct?		11 asking you specifically whether a creator royalty	
12 MS. EADS: Objection as to form.		12 applies at all, and I want to know whether you're	
13 Q You may answer.		13 basing your assertion that it does on schedule B-7 on	
14 THE WITNESS: Can you read back the		14 the fact -- on some opinion that there's extensive use	
15 question.		15 of the character in Spawn 9 which appears in the trade	
16 (Reporter reads back previous question)		16 paperback, or are you referring to the other provision	
17 A That's my understanding, yes.		17 in Exhibit 2 which simply lists a creator royalty	
18 Q And you got that understanding from Neil and his		18 calculation under collected editions?	
19 lawyers?		19 A Well, it's under Spawn 9, he did create Spawn 9, a	
20 A Yes.		20 character, and we're doing a proration, because the	
21 Q Schedule B-7, Spawn trade paperback II, which includes		21 stories written by Gaiman is one and total stories in	
22 Spawn 9, do you see that?		22 the book is five, so there is really a proration	
23 A Yes.		23 related to this particular trade paperback only	
24 Q You've got a four percent royalty rate here and in		24 relating to Spawn 9.	
25 your note 2, it says Gaiman receives creator royalty		25 Q So the simple fact that it's a trade paperback or	
	154		156
1 as well as writer royalty, am I reading that		1 collected edition doesn't automatically trigger	
2 correctly?		2 creator royalty, is that correct, there still has to	
3 A Correct.		3 be some extensive use of the character or a created	
4 Q And so if I look back at the earlier schedules that		4 character as you argue in Spawn 9?	
5 four percent is simply the addition of the 3.2 percent		5 A Well, Spawn 9 is part of B-7 or that particular	
6 and 0.8 percent writer and creator royalty that appear		6 collection and so since we calculated that in B-5,	
7 on the earlier schedules, correct?		7 when it becomes part of this additional collection,	
8 A Well, it's under the Exhibit 2 where it says collected		8 the creator royalty on these units applies.	
9 editions or trade paperbacks, et cetera, that it's at		9 Q I think I follow you. Let me ask you this question,	
10 creator royalty of .8 and the writer of 3.2, so that		10 maybe we can come at it this way. Take a look at	
11 equals four.		11 Exhibit 2, if you would, please.	
12 Q Do you understand -- let me ask you this, maybe this		12 A Yes.	
13 will make it clear. I'm not sure why -- well, let me		13 Q I believe you testified for the most part this	
14 step back. What is the basis for your note 2 on		14 document contains the royalty terms of the alleged	
15 schedule B-7 that says Gaiman receives creator royalty		15 1997 contract, correct?	
16 as well as writer royalty, is it the same thing as		16 A Correct.	
17 your conclusion that he receives a creator royalty for		17 Q And it's this document that you used for all your	
18 Spawn issue 9 or does it come from your reading of the		18 calculations of royalty terms in your various	
19 alleged contract, Exhibit 2, in which Neil had a		19 schedules and your expert reports today, correct?	
20 separate section that just said collected editions,		20 A This is the framework, yes.	
21 trade paperbacks, et cetera?		21 Q In the very middle of that Exhibit 2 where it says	
22 THE WITNESS: Can you read back the		22 comics and then there's a creator royalty and a writer	
23 last question.		23 royalty, do you see that?	
24 (Reporter reads back previous question)		24 A Yes.	
25 A Well, it goes to two issues. One is that in Spawn 9,		25 Q Then down below in collected editions, there's a	

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<p>1 creator royalty and a writer royalty, correct?</p> <p>2 A Correct.</p> <p>3 Q If you stop right there and don't read anything below</p> <p>4 that, put your hand over the remaining text there,</p> <p>5 would you read that? And I realize I'm asking you to</p> <p>6 speculate, but you're an expert, you can do this.</p> <p>7 Would you read that as stating that on all the comics</p> <p>8 that Neil was involved with or that contained a</p> <p>9 character -- or how would you determine what comic</p> <p>10 books Neil gets a creator royalty and which comics</p> <p>11 books he doesn't?</p> <p>12 MS. EADS: You're not talking about</p> <p>13 trade paperbacks anymore now?</p> <p>14 MR. SALSICH: They're included in</p> <p>15 the collected editions, too.</p> <p>16 Q If you see there, there's nothing that indicates --</p> <p>17 until you get down to the words character equity in</p> <p>18 Exhibit 2, there's nothing at that point that</p> <p>19 indicates why there's a difference between a creator</p> <p>20 royalty and a writer royalty or what those terms mean,</p> <p>21 would you agree with me on that, at least?</p> <p>22 MS. EADS: Are you asking him to</p> <p>23 interpret this contract?</p> <p>24 MR. SALSICH: I'm asking him to</p> <p>25 tell me what he reads on these pages and if he</p>	<p>157</p> <p>1 be equal.</p> <p>2 Q Well, that's what I'm trying to do. Let's do a little</p> <p>3 math with me here, let's just work our way down</p> <p>4 Exhibit 2, okay, we'll do this in a hypothetical</p> <p>5 situation. Let's assume that we're going to talk</p> <p>6 about a comic book, we'll call it <i>Spawn 2000</i>, are you</p> <p>7 with me?</p> <p>8 A Correct.</p> <p>9 Q And <i>Spawn 2000</i> includes the character of <i>Angela</i> on six</p> <p>10 pages, and if I understood your testimony correctly,</p> <p>11 that means that this character equity would be</p> <p>12 triggered, because that would constitute extensive use</p> <p>13 of the character, okay?</p> <p>14 A Okay.</p> <p>15 Q Now, looking at -- and say we have total sales of</p> <p>16 99,999 units on <i>Spawn 2000</i>, okay?</p> <p>17 A Okay.</p> <p>18 Q But under 100,000 copies.</p> <p>19 A Okay.</p> <p>20 Q And the only reason I'm doing that is so we don't have</p> <p>21 to add five percent of one figure and 8 percent of</p> <p>22 another or .5, let's say 99,999 issues of <i>Spawn 2000</i></p> <p>23 and <i>Angela</i> appears on six pages.</p> <p>24 A Okay.</p> <p>25 Q And I want to calculate the royalty Neil is due under</p>
<p>1 agrees with my interpretation. I'm not asking him</p> <p>2 to offer a legal interpretation of this as a</p> <p>3 contract or anything else, but I'm asking him to</p> <p>4 help me work his way through this, because he</p> <p>5 testified that that's in fact exactly what he did</p> <p>6 in coming to his conclusions.</p> <p>7 MS. EADS: I think you are asking</p> <p>8 him for legal conclusions and I object as to</p> <p>9 form. You can answer, if you can.</p> <p>10 A Can you repeat the question?</p> <p>11 Q Sure. Well, all right, let's try it this way. Do you</p> <p>12 see where it says character equity on Exhibit 2?</p> <p>13 A Yes.</p> <p>14 Q And it says, "(This activates in the event of</p> <p>15 'Extensive use of character, or character's name in</p> <p>16 the title of a publication')", right?</p> <p>17 A Right.</p> <p>18 Q Do you understand that to be or did Neil tell you that</p> <p>19 that was the same as the creator royalty that's</p> <p>20 reflected under comics and collected editions above?</p> <p>21 MS. EADS: Objection as to form.</p> <p>22 Q You may answer.</p> <p>23 MS. EADS: Do you understand or did</p> <p>24 Neil tell you? It's two questions.</p> <p>25 A Neil never equated those two particular paragraphs to</p>	<p>158</p> <p>1 Exhibit 2, and I realize we don't have a dollar</p> <p>2 figure, because I haven't given you a sales price, but</p> <p>3 let's say we have a sales price. Do you have a</p> <p>4 calculator with you?</p> <p>5 A Yes, I'll have to take your notes on your assumptions</p> <p>6 then.</p> <p>7 Q This won't take long, but I think it's important.</p> <p>8 MS. EADS: Speaking of taking long,</p> <p>9 so far this deposition has almost gone six hours,</p> <p>10 just to let you know. I believe the Federal rule</p> <p>11 says seven.</p> <p>12 MR. SALSICH: Thanks.</p> <p>13 A Okay.</p> <p>14 Q Let's assume -- let's make it easy, let's assume</p> <p>15 90,000 sales.</p> <p>16 A Units?</p> <p>17 Q 90,000 units sold at \$1 per issue, that's the sales</p> <p>18 price, cover price.</p> <p>19 A Okay.</p> <p>20 Q That equals, according to my calculations, \$90,000 in</p> <p>21 gross sales, correct?</p> <p>22 A Correct.</p> <p>23 Q This is <i>Spawn 2000</i> and <i>Angela</i> appears on six pages and</p> <p>24 therefore <i>Angela</i> -- that is considered to be extensive</p> <p>use of the character as you have defined it and that</p>

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	161	copies, is that really the same thing as the creator royalty .5 percent up above?	163
1		MS. EADS: Objection as to form.	
2		A I don't know how it was derived.	
3		Q What I'm saying is when I look at schedule B-1, I don't see an additional .5 for character equity, and so it's my understanding that what Neil was trying to say is that the -- and I realize I'm telling you my understanding here, but my understanding of what Neil was trying to say here is that the creator royalty is essentially the same thing as character equity that kicks in when there's extensive use of the character.	
4		And I believe you explained to me earlier when you were testifying about schedule B-12, for example, that you assigned Neil a creator royalty for those other appearances of Angela, because there was, quote, "Extensive use of the character," and that Angela had appeared on five or more pages, is that correct?	
5		MS. EADS: Object as to the form,	
6		to the extent the entire first part of your question was consistent of your own interpretations of the contract.	
7		Q Did you understand my question, Mr. Caven?	
8		A Well, I understand the question to be almost to me a hypothetical, because you're making a statement that I	
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	162	haven't been provided that same information, that the two, creator royalty and character equity, are the same thing, so I was --	164
1		Q You don't have an opinion one way or the other on that, is that correct?	
2		A No, I do not have an opinion that character equity and creator royalty are the same.	
3		Q You don't have an interpretation one way or the other, is that correct?	
4		A I think that would be a legal interpretation and that's beyond the scope of what I was asked to provide.	
5		Q Did Neil tell you anything about when creator royalty applies?	
6		A I'd have to recall notes, if we took those notes at the meeting, but my understanding of the creator royalty is when there is a character created within the context of that comic book, the creator royalty applied.	
7		Q Only the sales of that comic book in which the character was created or for all future appearances by that character?	
8		MS. EADS: Objection as to form, to the extent you're asking for a legal conclusion.	
9		Q Go ahead and answer.	
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	165		167
1 A My understanding is that the creator royalty		1 entitled to any royalties on these issues?	
2 terminated upon the exchange date and that the		2 A Under your hypothetical, you've changed all the	
3 extensive use or other appearances or publications in		3 variables to a negative, so I would have to agree with	
4 which Neil did not write or author or participate in		4 that.	
5 the project, but the character was continued on.		5 Q Let's see if we can get a litter clearer. The only	
6 Q Did the character have to be continued on on any		6 variable I'm changing is I'm changing the definition	
7 number of pages or just on one page?		7 of extensive use.	
8 A Under schedule B-12 and B-13 and B-14, we used the		8 A Correct.	
9 threshold that it was to be on at least five pages.		9 Q It's no longer five issues, five pages, let's say it's	
10 Q And that's what you've defined as extensive use of the		10 15 pages and it turns out that Angela doesn't appear	
11 character, correct?		11 on 15 pages in these issues and I realize those are	
12 A Correct.		12 speculations, but I'm asking you if that definition of	
13 Q Again, if you look at schedule B-8, you assert with		13 extensive use changes, is it possible that Mr. Gaiman	
14 respect to Spawn paperback 6, which includes Spawn		14 may not be entitled to any royalties?	
15 number 26?		15 A Well, it's the same answer, because as I said, you've	
16 A Correct.		16 changed two variables. One is the threshold and one	
17 Q That Gaiman received a creator royalty as well as a		17 is the variable of actually how many pages that they	
18 writer royalty, correct?		18 actually appear, so based upon those two variable	
19 A Correct.		19 changes, you've changed it to the negative. I have to	
20 Q Is that because you concluded that for Spawn 26, the		20 agree that it's possible because you've changed the	
21 issue itself, Gaiman gets both a creator royalty and a		21 information.	
22 writer royalty?		22 Q When you look at Exhibit 2 and you see the phrase	
23 A Correct.		23 character equity, and there's that provision that says	
24 Q Look at schedule B-12.		24 this activates in the event of, quote, extensive use	
25 A Got it.		25 of character?	
	166		
1 Q You've only calculated a creator royalty for these		1 A Correct.	
2 five issues of Spawn in which Angela appears, correct?		2 Q If I look at Exhibit 2, I see that extensive use of	
3 A No, we used the character equity provision.		3 character, each of those words is capitalized at the	
4 Q But you've got it as a line item called creator's		4 start of that and it appears in quotes, is that	
5 royalty, correct, on B-12?		5 correct?	
6 A We've used that word interchangeably.		6 A Correct.	
7 Q That's what I was trying to get to earlier. So we		7 Q Does that appear to you to be some sort of a defined	
8 look at that and you don't have a writer's royalty,		8 term or typical of what you would see when someone is	
9 because Neil did not write any of these comic books		9 trying to use a defined term, to put those terms	
10 that appear on schedule B-12, correct?		10 either in quotes or capital letters?	
11 A Correct.		11 MS. EADS: Objection as to form.	
12 Q And you've chosen to opine that he has a creator's		12 A That would probably be more for a legal stylistic	
13 royalty coming to him of \$10,520.08 based on the sales		13 approach, rather than a conclusion.	
14 of these five comic book issues, correct?		14 Q So perhaps a legal stylistic approach that would come	
15 A Correct.		15 out of a contract, correct?	
16 Q And in your narrative report and earlier testimony,		16 A Perhaps, I wouldn't have an opinion whether or not	
17 you stated that that was because in these five Spawn		17 that's correct.	
18 issues, Angela appeared on at least five pages and		18 Q If you look above on Exhibit 2, where Neil says, "I've	
19 that satisfied your definition of extensive use, is		19 put together a set of figures which are based on the	
20 that correct?		20 basic DC deal," is it reasonable that perhaps the term	
21 A Correct.		21 extensive use of character is something that's defined	
22 Q My question is this, would you agree with me that if		22 in the basic DC deal?	
23 extensive use of the character as that term is used in		23 MS. EADS: Objection as to form.	
24 Exhibit 2 meant something other than appearing on five		24 A It's hypothetical. Without having reviewed the DC	
25 pages, that it's possible that Mr. Gaiman might not be		25 provisions that I can recall at this time to see	

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1	whether or not that definition was in there, I can't answer that.	1	assumption on estimate of the units sold for Spawn issue number 100, correct?
2		2	
3	Q Would it have been professionally appropriate, in your opinion, when you say what appears to be a defined term, it's the only place that I see where capital letters are used and quotes are used and elsewhere in the agreement, there's reference to a different contract.	3	A Correct.
4		4	Q Can you explain how you came up with that number of units sold?
5		5	6 A Well, it's based on a print run of 223,792.
6		7	Q Okay.
7		8	A And the only way we had total print run and actual units sold collectively together on any issue is we used the Spawn 9 ratio of units printed versus units sold.
8		9	
9	Do you believe it would have been professionally necessary for you to verify what that term meant or to see if that term actually appeared and was defined in the contract that's referenced above?	10	Q Now, you had information about the print run of Spawn number 100 in November of 2000, but you didn't yet have information on how many units were actually sold, correct?
10		11	A Correct.
11	MS. EADS: Counsel, in the first place, you've misrepresented the document. There are a great many capital letters in there such as gross, net, motion pictures, audiovisual, stage plays, et cetera, et cetera, so I object as to form. You can answer the question and I'd like a break before we head into this last hour.	12	Q And the only other issue that you had a print run to units sold ratio was for Spawn issue 9, is that right?
12		13	A That's what my footnote says, yes.
13	A Only to the extent that it would have necessitated a legal conclusion and I'm not rendering a legal conclusion on the definition of extensive use.	14	Q Well, I don't read your footnote saying that that's the only other issue, it just tells me that that's the issue you chose. Do you have print run information on other issues?
14		15	A Not that I'm aware of, without having to go back to all the documents, but because we got 134 so late --
15	Q You did come up with a definition of extensive use, didn't you, though?	16	
16		17	
17	A As I defined it in our report.	18	
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19		20	
20	Q And you did that based on what Neil told you, right?	21	
21	A And his counsel.	22	
22	Q And his counsel, but you didn't bother to look at the DC Comics contract that Neil says these figures were all based on, correct?	23	
23	MS. EADS: Objection as to form and to tone, by the way.	24	
24	A I may have looked at it, but relied on Neil and his counsel for its interpretation.	25	
25	MR. SALSICH: Fair enough, let's take a break.		
26	(A short recess is taken)		
27	(Mr. Smith takes the place of Ms. Carter)		
28	Q A couple of quick questions, Mr. Caven, and I appreciate your patience with us today. I know it's been long, but I don't think we have a great deal left to cover. You have a lot of pages of schedules and a lot of detail in your reports and we just want to make sure that we understand the opinions you're going to offer at trial.		
29	So again, I appreciate your patience in working with us on this. I'd like to ask you another question about schedule B-12, do you have that in front of you?		
30	A Yes.		
31	Q For your note 2, it appears that you've made an		
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	173		175
1	it, we may have received print run information on a couple copies, but when we actually looked at it, the one had a typo in it. Other information appeared to be inconsistent with another quarterly statement, so we just used the Spawn 9.		Q My point is, you had units sold for 97, 98 and 99, correct?
2			A Correct.
3			Q You don't have units sold for 100?
4			A Correct.
5			Q Would a reasonable method for estimating the units sold for issue 100 have been to average the sales of the three previous issues that were published in the few months prior to the issue for which you do not have sales?
6	Q Did you have any indication that Spawn 100 had a substantially higher print run than Spawn 97, 98 or 99?		A That's under the assumption that the print runs were identical in the other three.
7			Q Well, I'm not talking about the print runs, I'm simply asking if you don't have any print run information on any of them, you simply have sales and you need to estimate sales for the fourth one in a series, is a possible reasonable alternative method to the one that you chose, would that have been simply to average the actual units sold of the three previous issues to come up with an estimate of units sold for the fourth issue?
8			A It's a method, I don't know if I could classify it as being a reasonable method.
9	A We did not have any information, I think, on 98 or 99 to know how much those total print runs were.		Q But it would be an alternative that someone could use, correct?
10			
11	Q Would you expect that -- I'm going to test a hypothesis here. Is it your opinion that it's appropriate to use the Spawn 9 sales to print run ratio for Spawn 100, would it be appropriate to use the Spawn 9 print run to sales ratio for any other sales that you don't have units sold for any other issues?		
12			
13			
14			
15			
16			
17			
18	A I think this is the only one that we didn't have actual numbers coming from Image.		
19			
20	Q I'm just trying to ask you if your decision to use the Spawn 9 print run to sales ratio was based on -- for		
21	Spawn 100, excuse me, was based on an assumption that		
22	it would be reasonable to expect a similar sales to print run ratio for other Spawn issues, is that part		
23	of your assumption?		
24			
25			
	174		
1	A Based on the information we had, yes.		1 A It's mathematically feasible to use that calculation.
2	Q So would you agree with me that you would then expect that Spawn 99, printed just two months prior to Spawn 100, would have a similar print run to sales ratio?		2 Q And it's also mathematically feasible, as you said, to take a ratio, to have sales to print runs to an issue 91 issues earlier and apply it here, correct?
3			3 A That's also reasonable in my conclusions.
4			4 Q Schedule B-15.
5	A It may or may not, not knowing the content, the characters.		5 A Yes.
6			6 Q You have just one note down there that you've made an estimate because the information on Spawn foreign printing is incomplete, and I'm not sure I understand what your estimate is, how you've arrived at your estimate. Could you explain that to me, please.
7	Q So would you agree with me that content and characters and maybe other factors might affect print run to sales ratio?		7 A If you go to B-16.
8			8 Q Okay.
9			9 A It calculated amount due of \$33,967.60.
10	A It may, I just had to use the best information that was made available to me and if I had to make some sort of judgment that that was a reasonable calculation.		10 Q Okay.
11			11 A And those were foreign royalties on Angela and so what we did was based on those royalties, domestic Angela royalties, we took that ratio, so \$33,000 divided by \$96,634, determined a ratio -- let's just use a third for rounding purposes, and we multiplied the \$76,713 by a third.
12			12 Q Okay. If I understand you correctly, you simply made an assumption that the ratio of Angela royalties, Angela domestic royalties to Angela foreign royalties,
13			13 A
14			14 Q
15			15 A
16			16 A
17			17 A
18			18 A
19			19 A
20			20 A
21			21 A
22			22 A
23			23 A
24			24 A
25			25 A

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	177		179
1	would be similar to the ratio of Spawn domestic	1	A Yes.
2	royalties to Spawn foreign royalties, correct?	2	Q You relied on the average units sold per issue figure
3	A Correct.	3	contained in Denis Kitchen's report, correct?
4	Q Now, in the Angela royalties, both the foreign and	4	A Correct.
5	domestic, you've included a creator royalty in	5	Q If Mr. Kitchen's estimates of units sold were
6	addition to the writer royalty, correct?	6	inaccurate, would you have to alter your calculations
7	A Correct.	7	as to the amounts due Mr. Gaiman?
8	Q And I know that you testified earlier that you also	8	A Yeah, they could be higher or they could be lower.
9	included a creator royalty in the Spawn royalties for	9	Q And I believe you answered this question for me
10	Spawn 9 and Spawn 26 and the two Spawn trade	10	before, but if it turned out that the number of issues
11	paperbacks in which those issues appear, correct?	11	anticipated in the one off, which you have as the last
12	A Correct.	12	line item here, was something other than four, than
13	Q My question is this, if the evidence shows that	13	that would also change your calculations, correct?
14	creator royalties were not appropriate for the Spawn	14	A Yes, that would change the calculations.
15	issues, would you have to change your ratio or would	15	Q And that's the same for schedule B-18 -- I'm sorry,
16	you still be able to use this same ratio that you used	16	not B-18, that's the same for schedule B-19, correct?
17	here?	17	A That's correct.
18	In other words, if for the Spawn 9 and the Spawn	18	Q And B-18 and B-20 are trade paperback calculations, so
19	26 and the two trade paperbacks, if Neil were only	19	there isn't an estimate of any more than one
20	entitled contractually to writer's royalties and not	20	publication, correct?
21	creator's royalties, would you be able to use the same	21	A I'm not sure I understand the question.
22	ratio that you used in comparing Angela royalties to	22	Q I mean for B-18, that's a trade paperback and so it's
23	Angela sales?	23	only contemplated that there will be one publication,
24	A Under your hypothetical, I would have to modify that	24	correct, there's not going to be four trade
25	ratio.	25	paperbacks?
	178		180
1	Q And we talked at some length earlier, although we	1	A No, it was -- it's a collection of four comic books in
2	didn't specifically look at these documents, about	2	one trade paperback.
3	schedules B-17, B-18, B-19 and B-20, which we should	3	Q And that's the same for B-20 as well, correct?
4	use not in Exhibit 204, but Exhibit 205, and I just	4	A Correct.
5	want to make sure that I understand what's reflected	5	Q For B-18, B-19 and B-20, the initial estimated units
6	on schedules B-17, B-18, B-19 and B-20 as attachments	6	sold is entirely dependant on Denis Kitchen's
7	to Exhibit 205. Do you have those in front of you?	7	calculations, correct?
8	A Yes.	8	A Repeat the question.
9	Q Let's look at B-17, and first, let me ask you this,	9	Q On schedule B-18, B-19 and B-20, the estimated units
10	did you make the same basic calculation on all four of	10	sold, the first line item on each of those schedules,
11	these schedules?	11	that figure is based entirely on Denis Kitchen's
12	A Yes.	12	expert report, correct?
13	Q And it's really two different methods of calculating	13	A Correct.
14	that you testified earlier, correct?	14	Q Could you look at schedule C-2, do you have that in
15	A Correct.	15	front of you?
16	Q One is based on Neil's startup contract, is that	16	A Yes.
17	right?	17	Q Can you explain your calculations in schedule C-2?
18	A Correct.	18	A I took the HBO revenue for Spawn video number one and
19	Q And the other method is based on the 50/50 profit	19	took a number of speaking roles, which I think there
20	split where Neil is sitting in the position of	20	were ten, per the worksheet we got off -- I don't know
21	Mr. McFarlane, is that correct?	21	if it was the internet, but there was a source
22	A Correct.	22	document that I had viewed that there was ten speaking
23	Q Let me just ask you this question then, on each of	23	roles within the context of that video, so we took a
24	your calculations here, both the minimum and the	24	proration of the HBO media payments and then applied
25	maximum, on schedule B-17?	25	the 15 percent royalty.

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	181	of speaking parts in aggregate and what Angela was in.	183
1 Q Where did you get the payment from HBO?		Q Well, I think it might be easier to do this, we don't	
2 A It's a royalty statement, 01542.		know how many -- let's assume that we don't know in	
3 Q Do you have that document with you?		the second episode, the fourth episode, there might be	
4 A Yes.		four speaking roles, there might be 40, but in the	
5 Q I thought I had that, but I don't appear to have that		episode in which Angela appears, there are ten, but	
6 in front of me, but I think I'm familiar with it. Let		that that episode is only one issue out of six.	
7 me ask you a question about it. Does it identify that		And my question is, wouldn't you have to take	
8 that's a payment for videotape number one totally?		first the payment from HBO, \$347,000 and divide that	
9 A It says HBO video Spawn royalty statement number 10		by six to arrive at the payment from HBO for the	
10 through December of '99.		episode in which Angela appeared?	
11 Q And how does it describe the product?		MS. EADS: Objection as to form.	
12 A It doesn't describe it any further than that.		Counsel, I want you to know that we are planning	
13 Q It's your understanding that that's Spawn video number		on leaving at 6:00, so you might want to leave	
14 one, correct?		some time for your co-counsel.	
15 A That's my understanding, yes.		Q You can answer the question, Mr. Caven.	
16 Q And what do you base that understanding on?		MS. EADS: Do you have any idea	
17 A Just in our requests for documentation with respect to		what he's talking about?	
18 the HBO, this was what was provided to us.		A I think what you're trying to say is that you're	
19 Q And Spawn video number one, let me ask you to assume a		trying to prorate each video having equal royalty.	
20 couple of facts for me, which I believe the evidence		Q Well, we only have a royalty statement for the entire	
21 will bear out. If the evidence is that Spawn video		videotape, the videotape it is consists of six	
22 number one is a collection on videotape of the first		episodes and Angela appears only in one of those	
23 series -- excuse me, the first season of the Spawn		episodes.	
24 video HBO miniseries -- strike that. Let's start		A Right, is each episode equal --	
25 over.			
	182		
1 Assume for me that Spawn video number one is a		Q Each episode is an equal amount of time, because they	
2 videotape collection of the first season of the Spawn		originally aired in a 30-minute or half an hour show	
3 HBO series, okay?		on HBO.	
4 A Okay.		MS. EADS: Counsel, that's an	
5 Q And I believe interrogatory answers and the document		argument you can make at trial.	
6 production will bear this out, and then the evidence		MR. SMITH: He's got to have a	
7 is that that first season consisted of six episodes,		right to question the witness on it.	
8 all right?		MR. SIMMONS: Pete, just to clarify	
9 A Okay.		under your hypothetical -- this is Jeff, are you	
10 Q And Angela appeared only in one of those episodes and		saying that there would be hypothetically 60	
11 in that episode in which Angela appeared, there were		speaking roles in the entire video?	
12 ten speaking roles, okay?		MR. SALSICH: No, maybe that's	
13 A I understand.		where we're getting confused.	
14 Q Wouldn't you have to make one further calculation in		MR. SIMMONS: Because it's one	
15 your amount due on schedule C-2 with that additional		videotape with six episodes, but there may or may	
16 bit of information?		not be -- you know, there's ten, there might be	
17 A Under that hypothetical, yes, I'd have to consider		ten speaking roles in the one episode, but those	
18 that.		same ten speaking roles may also be in all the	
19 Q And how would you apply that additional bit of		other episodes as well.	
20 information?		MR. SALSICH: Under my	
21 A Well, you've actually created it to be ten speaking		hypothetical, Jeff, at least one of those speaking	
22 roles in one video, which is a one-sixth, if that's		roles doesn't appear in the other five issues and	
23 the total number of speaking roles in every video, but		that's Angela, so I think the speaking roles can	
24 you'd have to make some sort of proration there that		be easily divided by episode based on how HBO	
25 the total royalty paid by HBO would reflect the number		originally aired the program.	

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1	The videotape is a collection of	1 A Correct.	
2	the first six episodes and Angela appears in only	2 Q And that's the same with A-10?	
3	one of those episodes.	3 MS. EADS: Through 13.	
4	Q So I'm asking you, Mr. Caven, under that hypothetical,	4 Q A-11, A-12 and A-13, that's correct?	
5	if it wouldn't be appropriate to take the payment from	5 A Correct.	
6	HBO for the entire videotape and first divide it by	6 Q Would you agree with me that in every single one of	
7	six in order to determine the payment from HBO on the	7 those schedules we've just discussed, Todd McFarlane	
8	episode in which Angela appeared.	8 Productions calculated the royalties due to Neil	
9	A Yes, you could prorate it based on the number of	9 Gaiman for these various products differently than you	
10	episodes and then apply the number of speaking roles	10 calculated them based on the alleged 1997 contract set	
11	within that particular video. You could aggregate all	11 forth in Exhibit 2?	
12	of the speaking roles in all six videos and take a	12 A Correct.	
13	proration of one by the aggregate.	13 Q And Exhibit 2 the alleged 1997 contract, and in fact,	
14	Q So you could do either of those two methods and come	14 the four letters that you've testified that Neil	
15	to an amount due under that hypothetical, correct?	15 Gaiman has told you comprise the 1997 contract?	
16	A Under that hypothetical, yes.	16 MS. EADS: Objection as to form.	
17	Q Mr. Caven, I really just have one more question or one	17 Q The latest of those letters was dated July 15, 1997,	
18	more area of inquiry. Would you take a look for me	18 correct?	
19	at -- and I want you to flip through these briefly on	19 MS. EADS: We never did get the	
20	schedules A-1 -- basically A-1 through A-13, not every	20 fourth one, so I don't know what date.	
21	single one of them in there, but that's basically the	21 A We've allegedly only marked 2, 19 and 20 as being	
22	group. Just have those at hand.	22 three of the four.	
23	A Okay.	23 MR. SMITH: I have the fourth,	
24	Q I'm asking really a group of questions based on your	24 Pete, if you want.	
25	observation of all of the schedules, so follow along	25 Q I realize we didn't find one, but if we look at page 3	
	186		188
1	with me, if you would. Schedule A-1, you have a	1 of your Exhibit 203 and you identify the four letters,	
2	column entitled, "Memo only per royalty report through	2 you also have July 15, 1997 as the last of the four	
3	7/31/97," correct?	3 pieces of correspondence, correct?	
4	A Correct.	4 A That's correct, and observing it over the opposing	
5	Q And it's my understanding that that reflects the	5 counsel's shoulder, yes, that's the date.	
6	royalty report and payment sent by Todd McFarlane	6 Q The next sentence on page 3 of Exhibit 203, the	
7	Productions to Neil Gaiman at the end of July or early	7 agreement reached as of July 15, 1997 provided, et	
8	August of 1997, correct?	8 cetera, et cetera, correct?	
9	A Correct, with respect to the toys.	9 A That's correct, I was only flipping through the three	
10	Q And schedule A-2 has a similar column and also	10 pages.	
11	reflects the royalty calculations and payments made by	11 Q So it's your testimony and your opinions are based	
12	McFarlane, Todd McFarlane Productions in August of	12 upon an assumption that an agreement was in fact	
13	1997 for the Medieval Spawn figures, correct?	13 reached between Neil and Todd on July 15 of 1997,	
14	A Correct.	14 correct?	
15	Q And the same with A-3, it has a similar memo only per	15 A Correct.	
16	royalty report, correct?	16 Q And yet you would agree with me that as of early	
17	A Correct.	17 August of 1997, two to three weeks later than July 15,	
18	Q So does A-5 for the Spawn Angela poster, correct?	18 1997, Todd McFarlane has calculated on numerous	
19	A Correct.	19 examples royalties based on an entirely different set	
20	Q And A-6 for Angela poster?	20 of terms, would that be correct?	
21	A Correct.	21 A I don't know if it's an entirely new set of terms.	
22	Q A-9 for trading cards has a similar memo only per	22 Q Well, at least with respect to the royalty rates, it's	
23	royalty report reflecting Todd McFarlane Productions	23 different on almost every single one of those	
24	calculations of royalties due and payments made in	24 schedules, is that not correct?	
25	August of 1997, correct?	25 A Correct, I think there's an assumption from Todd that	

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1	he's a co-creator and therefore splits the creator	1	he's provided.
2	royalty rate in half.	2	Q Very good. Other than the supplemental rebuttal
3	Q He does that, he actually does some different things,	3	analysis and reviewing deposition transcripts and
4	too, on A-10, he adds a factor for weight of	4	making any adjustments as a result of that, is there
5	characters against main character, does he not?	5	any other specific analysis that you presently have in
6	A That's correct, on A-10 there is a difference for a	6	mind that remains to be done?
7	weighting, on A-11, the same weighting.	7	A No, not that I'm aware of.
8	Q And so my question is simply this, does it appear to	8	Q Do you have any work to do with respect to any other
9	you in observing the correspondence from Mr. McFarlane	9	causes of action that are not reflected in your expert
10	and the royalty calculations from Mr. McFarlane in	10	report and supplemental report?
11	August of 1997 that he understood things differently	11	A Well, now that we have determined that the \$45,000 use
12	than Neil Gaiman regarding the amount and calculation	12	of name should be really reflected as a separate cause
13	of royalties that Mr. Gaiman was entitled to?	13	of action, that will be segregated or supplemented via
14	MS. EADS: Objection to form,	14	my report.
15	there's no foundation for that question.	15	Q But –
16	Q I'm just asking how it appears to you.	16	A Or to the extent that because now we have
17	A I don't know to his understanding as much as what he	17	distinguished between the analysis that if there is a
18	did.	18	contract or there isn't a contract, I don't know if
19	Q Does it appear on the face of the document you	19	there's analysis or at least discussion within the
20	reviewed and you included in your schedule that	20	context of the framework of how you would go about
21	Mr. McFarlane or Todd McFarlane Productions calculated	21	determining profits, if that's to be part of my
22	the royalties differently than you interpret Exhibit 2	22	testimony or not. We have not described or detailed
23	to require?	23	whether or not it would be part of that at this time.
24	A Yes, he applied them differently.	24	Q Well, we'll get to the publicity issue in a moment,
25	MS. EADS: Okay, 15 minutes left.	25	but other than with respect to that claim, is there
	190		
1	MR. SALSICH: Do you want to talk	1	any analysis that you've been tasked to do with
2	about a debate?	2	respect to any other new claims or causes of action
3	MS. EADS: Yes.	3	that you've not yet done?
4	MR. SALSICH: Scott's, it's with	4	A Not that I'm aware of.
5	great pleasure that I turn the questioning over to	5	Q For example, have you been tasked to do any analysis
6	you right now.	6	on an unjust enrichment plan?
7	MR. FELDMANN: I'll do my best to	7	A I've not been made aware of that cause of action
8	finish within the next 15, if we can we can and if	8	issue.
9	not, then we'll take it up later.	9	Q How about false advertising?
10	<u>EXAMINATION</u>	10	A No, I've not been made aware of any work to be done on
11	<u>BY MR. FELDMANN:</u>	11	that issue.
12	Q Mr. Caven, I represent Image Comics and I appreciate	12	Q How about Lanham trademark infringement, also known as
13	your patience. You testified earlier that you did	13	reverse passing off?
14	have some work left to do, you mentioned the	14	A No, I've not been asked to do any work on that issue.
15	deposition transcripts and so forth. Do you have	15	Q Do you expect to do any work and present any testimony
16	any -- and that as a result of that review, you might	16	with respect to that last cause of action?
17	make some adjustments to your findings in your expert	17	A Counsel and I have not discussed that issue at this
18	report, is that correct?	18	time.
19	A Yes, based upon what I read out of those depositions.	19	Q Same question with respect to false advertising.
20	Q Other than that, do you have any specific analysis in	20	A I don't know, because I've not discussed that issue
21	mind that you've been tasked to do, but you've not yet	21	with counsel.
22	done?	22	Q Sitting here today, you don't intend to testify on
23	A Well, the analysis would be specifically to look at	23	either the false advertising or Lanham claims, do you?
24	Mr. Klingele's report, provide any analysis and	24	A I haven't been asked at this point to comment on
25	rebuttal or supplemental report to that report that	25	those, so I don't know what counsel has in mind on

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1	those issues.	1	gentlemen. What specifically did Mr. Kitchen tell you?
2	Q You've done no analysis with respect to those two	2	A I think he only related, as well as Mr. Martens,
3	claims?	3	specific instances in which, in their experience, they
4	A Correct.	4	have been approached by a particular publisher to
5	Q Now, turning your attention now back to the right of	5	revive or use a particular author and character within
6	publicity claim, and if you would please turn your	6	the context of not doing any work on the project, but
7	attention to Exhibit 203, on page 11, you reference	7	at least lending their name to the project.
8	this document, G05356-05361?	8	
9	A Correct.	9	Q Well, I'd like you for now to exclude any comments you
10	Q For the record, I don't believe that document has been	10	may have with respect to Mr. Martens, just
11	produced to Image Comics. Co-defense counsel has	11	Mr. Kitchen. Is your testimony still the same just
12	given me a brief description of it. Is there any	12	with respect to Mr. Kitchen, your last answer?
13	other basis for the right of publicity analysis that	13	A Yes.
14	you've done, other than that document that's been	14	Q Would it surprise you to learn that Mr. Kitchen has
15	identified?	15	testified that this is an unprecedented situation for
16	A Sorry for the pause, we're looking for the document.	16	him in discussing a hypothetical where an artist's
17	Q It's the Big Entertainment, Inc.	17	name was used without permission on a trade paperback,
18	A I understand, we just have several piles of paper in	18	and would that change your analysis to learn that
19	front of us and it may have --	19	Mr. Kitchen was unaware of any situation where that
20	MS. EADS: It was produced.	20	has occurred before?
21	MR. SMITH: Has it been marked as	21	A I think I was answering it in the form of not the
22	an exhibit? I haven't been here, so I wouldn't	22	hypothetical where somebody's name was used without
23	know.	23	permission, I think it was within the context that if
24	MS. EADS: Yes, it was marked as an	24	somebody came and asked him for permission to use
25	exhibit, I'm pretty sure.	25	somebody's name with a project that there is some sort
	194		196
1	MR. SALSICH: I don't believe it	1	of negotiation between that publisher and the author.
2	was actually marked as an exhibit, no, that was	2	Q Well, if Mr. Kitchen were to testify that or to tell
3	the royalty agreement that we marked. Let's make	3	you that he's unaware of that ever occurring in the
4	that 207.	4	past, would that change the basis for your opinion
5	(Exhibit 207 is marked for identification)	5	that plaintiffs are due \$45,000 for use of their name
6	MR. FELDMANN: Then we're on an	6	on the Angela trade paperback?
7	even playing field.	7	MS. EADS: Objection as to form.
8	MR. SMITH: I've handed 207 to the	8	When you said that, you didn't define it and we
9	witness.	9	don't know which that you're talking about.
10	Q In fact, Mr. Caven, my question is other than that	10	THE WITNESS: Can you read back the
11	document, is there anything else other than your	11	question?
12	discussions with Mr. Gaiman and his counsel that forms	12	(Reporter reads back previous question)
13	the basis of the damages analysis you did on the use	13	A Once again, I'm not clear when you say Mr. Kitchen
14	of name claim?	14	will testify to that.
15	A No other additional analysis, other than in discussion	15	Q That he's unaware of any deal where an artist or
16	with counsel and Mr. Gaiman that this was an instance	16	author has been paid solely for use of his name for a
17	in which he had used his name, but in fact, I think I	17	trade paperback.
18	did talk about this with Mr. Kitchen, now that I	18	MS. EADS: Objection as to form.
19	recall, and Mr. Martens.	19	A No, because this would really be specific to Neil,
20	And not to the actual amount, but if that is	20	because Neil would be the one that would have
21	something that is done within the context of the	21	negotiated any sort of particular advance or royalty
22	industry and it is my understanding, yes, there is	22	for that particular use of his name, so whether
23	some sort of advance that can be paid to a major	23	Mr. Kitchen would testify that he is unaware, that
24	author for lending their name.	24	would be not something that would influence my
25	Q Let's take those in order, since you referenced two	25	decision, because Mr. Gaiman actually effectuated that

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1 transaction back in 1993.
 2 Q You're referring to forming an alleged contract?
 3 A I'm not sure I understand the question, I'm sorry.
 4 Q I'll withdraw that one. Let me just ask with respect
 5 to your conversations with Mr. Martens, would your
 6 answer be the same as well?
 7 MS. EADS: Objection as to form,
 8 answer to what?
 9 Q I'll be happy to just restate it. If Mr. Martens were
 10 to tell you that he was unaware of any deals in the
 11 comic book industry where an author had negotiated to
 12 be paid solely for the use of his name on a trade
 13 paperback, would that change your opinion as to the
 14 value of the use of name claim?
 15 A No, because really, the sole reliance that I'm placing
 16 on it is the fact that Neil has already, in his
 17 opinion, negotiated a transaction which reflected the
 18 use of his name within the context of that deal and I
 19 think it would be really specific to an author such as
 20 Neil, Neil's stature and background, which may be
 21 different than other authors, solely because of his
 22 popularity.
 23 Q You're referring to 207, is that right, the Big
 24 contract?
 25 A Correct.

197 199
 1 earlier testimony and subsequent testimony. With the
 2 document in front of us being 207, it is an advance of
 3 \$45,000 which then is applied against a royalty rate
 4 of eight percent and one percent.
 5 Q And the one percent is on what?
 6 A Guest appearance character or a secondary character.
 7 Q Now, in your analysis, did you separate a breakout
 8 between the use of Neil's name and the value of his
 9 sketches?
 10 A No, I did not.
 11 Q Do you have an opinion as to what the value was of the
 12 sketches that he submitted?
 13 A Only under the reliance of Neil's conclusions that
 14 these sketches were worth very little, if nothing,
 15 because really, he thought the majority, if not all
 16 they wanted from him, was the use of his name.
 17 Q Well, correct me if I'm wrong then, would it be fair
 18 to state that your opinion rests upon an assumption
 19 that the value of those sketches was zero percent?
 20 A Yes.
 21 Q Now, under the terms of 207, if Neil was fully paid
 22 all of his royalties, then he wouldn't be due anything
 23 else for the use of his name, is that correct?
 24 MS. EADS: Objection as to form.
 25 THE WITNESS: Can you read back the

198 200
 1 Q Now, with respect to that, you mentioned that he was
 2 paid for brainstorming, some sketches and use of his
 3 name, is that correct?
 4 A That's my understanding.
 5 Q Do you know if those sketches were written?
 6 A Can you be more specific?
 7 Q You said that he came up with 12 sketches and your
 8 understanding is that six of them were used, my
 9 question to you is, did he deliver something written
 10 to the other party in the Big deal?
 11 A I didn't ask if he had submitted those in writing to
 12 the other party in the context of the negotiations, I
 13 don't know what was delivered.
 14 Q And if I heard you correctly at first, you testified
 15 that he was entitled to \$45,000 plus eight percent of
 16 the royalties and then later, that it was simply an
 17 advance, the \$45,000 was simply an advance on an eight
 18 percent royalty, is that latter statement an accurate
 19 description of the terms of the Big deal?
 20 MS. EADS: Objection as to form. I
 21 think you've mischaracterized his testimony and I
 22 realize that you're at a disadvantage and you
 23 can't actually see the contract.
 24 A You don't have the contract in front of you, I'll just
 25 clarify it, whether or not there was ambiguity in the

question.
 (Reporter reads back previous question)
 3 A I think the character of the contract was that if he
 4 was paid royalties, that was reflecting the use of his
 5 name under the assumption that the sketches were worth
 6 zero.
 7 Q Right, and so the \$45,000 simply is a minimum royalty
 8 on a pay out scheme where he's paid based on
 9 royalties, is that right?
 10 A Correct, if he received total royalties of \$100,000
 11 from that particular project, you know, and there's no
 12 value ascribed to the sketches, his total use of the
 13 name would have been \$100,000.
 14 Q Now, I think you also pointed out an adjustment you
 15 wanted to make to your report stating that the \$45,000
 16 was an alternative, noncontract measure, is that
 17 accurate?
 18 A Correct.
 19 Q So in effect, as I understand it, if there was a
 20 contract formed between Todd and Neil, then the proper
 21 measure of damages is the royalty rate reflected in
 22 the schedule, and if there wasn't, then the proper
 23 measure is the \$45,000 for use of his name, is that
 24 right?
 25 MS. EADS: Objection as to form.

Deposition of JAMES P. CAVEN 9-17-02

		203
1	A Essentially, yes, that's what's going to be within our revisions.	understand it from him, Image and Dark Horse are roughly three and four or four and three, depending on what day you talk to them, to gain more understanding of crossover projects, splitting of profits, collaboration.
2	Q So there's not going to be any double recovery, correct?	
3	A Correct.	
4	Q Now, why in your professional opinion is the eight percent royalty rate in 207 a reasonable one?	
5	MS. EADS: Objection as to form, I don't think this witness ever testified it was.	
6	Q Well, I'll be happy to back up. Mr. Caven, do you believe that the eight percent royalty rate reflected in 207 is a reasonable one?	
7	A I haven't done any research to know whether or not this eight percent is a reasonable royalty, other than to know that in licensing on foreign particular projects, that eight percent royalty, seven percent royalty is within the range, but I have not done any research to determine eight percent is reasonable.	
8	All I know is that the advance payment was the advance payment for this project.	
9	Q Well, turning your attention to Exhibit 204, the schedules, your schedule B-1 and onwards, I believe, assume a four percent royalty rate, is that correct, if one gets a -- sells over 100,000 copies?	
10	A Yes, to the extent that they are the writer and the	
201		
1	creator, there's a four percent royalty.	
2	Q So sitting here today, with the testimony being that the value of the sketches is zero and the royalty rate is eight percent, versus four percent for being the writer and creator used in your own analysis, would you agree that the eight percent rate reflected in Exhibit 207 is on the high side?	
3	MS. EADS: Objection as to form.	
4	A I don't know if it's on the high side, because there is risk of a project not meeting his standards and since he cannot control the final output of the writer and creator characters, it may be within the relative range, given the risk of his name being lent to that particular project.	
5	Q What percentage of the time that you spent in this engagement has been spent on the use of name claim?	
6	A I couldn't give you a breakdown.	
7	Q Well, would it be more than 20 percent?	
8	A No.	
9	Q Would it be more than ten percent?	
10	A Probably somewhere between five and ten percent.	
11	Q Now, why did you have any conversations with Michael Martens at Dark Horse?	
12	A Just as another industry resource person, given that their company is somewhat equal to Image, as I	
202		
1	A Well, I think we mentioned Image only from the standpoint that Image is where these particular comics were published for the Spawn and Angela projects and that Todd had used Image, and I think it was pretty well known in the industry who does what work, but I don't think there was anything specifically discussed about Image's role in this lawsuit.	
2	Q Just for clarification, would it be true that you have not formed any opinions as to any damages allegedly claimed by plaintiffs for not using Mr. Gaiman's name on a publication, is that true?	
3	THE WITNESS: Can you read back the question.	
4	(Reporter reads back previous question)	
5	Q And since there's a double negative there, I'll just rephrase it.	
6	A Thank you, it's been a long day.	
7	Q Mr. Caven, have you formed any opinion as to any damages sustained by plaintiffs for not using Mr. Gaiman's name on a publication?	
8	A Yes.	
9	Q And again, I'm referring to not using his name. What is the amount?	
10	A Oh, I'm sorry.	
11	Q Did you want to clarify your answer?	
203		

Deposition of JAMES P. CAVEN 9-17-02

1 A Yes, I would clarify the answer, because it is --
 2 MS. EADS: It's been a very long
 3 day.
 4 A And it's still a double negative, so to speak.
 5 Q My apologies on that. With respect to not using
 6 Mr. Gaiman's name on a publication, have you formed an
 7 opinion as to any damages that would be due to
 8 plaintiffs?
 9 A I'm not aware that there has been that circumstance
 10 and have not calculated a damage accordingly.
 11 Q So you could not identify any publications, for
 12 example, that might support the basis of any opinion,
 13 is that right?
 14 A That's correct.
 15 Q Mr. Caven, you said that you relied upon 207, did you
 16 look at any other documents? I understand that you're
 17 relying solely upon 207, Mr. Gaiman and his counsel's
 18 statement to you, but did you look at any other
 19 documents in coming to an assessment of the value of a
 20 right of publicity claim?
 21 A No, I did not look at any other documents, because I
 22 was told that there weren't any other documents that
 23 existed that Neil had entered into.
 24 Q And sitting here today, you're not aware of any other
 25 documents that would be relevant to forming that

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 1 STATE OF WISCONSIN COUNTY OF DANE
 2 I, NANCY L. DELANEY, a Notary Public commissioned
 3 and qualified in and for the State of Wisconsin, do
 4 hereby certify that there came before me on September 17,
 5 2002, at the offices of LaFollette, Godfrey & Kahn,
 6 Attorneys at Law, One East Main Street, Madison,
 7 Wisconsin, the following named person, to wit: JAMES P.
 8 CAVEN, who was by me duly sworn to testify to the truth
 9 and nothing but the truth of knowledge touching and
 10 concerning the matters in controversy in this cause; that
 11 the witness was thereupon carefully examined under oath;
 12 that said examination was taken in shorthand by me and
 13 reduced to writing using computer-aided transcription;
 14 that said deposition is a true record of the testimony
 15 given by the witness; that the witness has not waived
 16 reading and signing. I further certify that I am neither
 17 attorney or counsel for, nor related to or employed by,
 18 any of the parties to the action in which this deposition
 19 is taken, and further that I am not a relative or
 20 employee of any attorney or counsel employed by the
 21 parties or financially interested in the action.
 22 In witness whereof I have hereunto set my hand and
 23 affixed my notarial seal September 19, 2002.
 24 My commission expires:
 25 Notary Public, State of Wisconsin

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 1 opinion, is that right?
 2 A That's correct.
 3 Q And coming up with the \$45,000 claim, you have not
 4 distinguished at all between plaintiffs' statutory and
 5 common-law causes of action, is that right?
 6 MS. EADS: Objection as to form.
 7 A Your question sounds more legal conclusions than
 8 accounting or economic conclusions, so.
 9 Q I just want to make sure there's only one claim out
 10 there for use of Mr. Gaiman's name. As far as you
 11 know, there's only one claim for damages and that's
 12 \$45,000, is that correct?
 13 A Correct.
 14 MR. FELDMANN: Thank you very much
 15 for your patience. That concludes my questioning.
 16 MS. EADS: Thank you.
 17 MR. SALSICH: I have nothing
 18 further to add. I'm all finished.
 19 (6:10 p.m.)
 20
 21
 22
 23
 24
 25

SPAWN 9.

Todd – the idea with the stuff I've done here in italics – the 'Hunting Manual' – is that we drop it in through the first Nine pages, with all the Olden Days Spawn and Angela stuff – a little bit here, a little bit there, so it counterpoints the meeting, the couple riding through the forest, the cave, and the fight. The language is intentionally slightly harder than some of your readers may feel comfortable with, but I wanted to give the impression we're dealing with a hunting manual, or an instruction manual of some kind, which is going to use its share of \$2 words.

cap: ***HELL SPAWN:***

cap: *Identification: The livery of Hell (see illustrations pages 1131-1150 for basic design and variants) is a sentient carapace, which covers the Hellspawn. Many Hellspawn are shapeshifters.*

cap: *Characteristics: In this manual we shall address only Hellspawn in the Worlds of the Living. Hellspawn in the Realms Beyond are not Game, and cannot be hunted unless and until a formal condition of War has been declared. Caution is always advised.*

cap: *Those Hellspawn in the Living Worlds are, however, fair game. They are the officer material that Malebolgia considers may prove worthy of high rank in The War To Come. Its usual technique is to consign them to Earth with a high, although limited, supply of power.*

cap: ***Hunting Methods:***

cap: *Young Hellspawn make the best sport.*

cap: *Firstly, they are often time-disoriented, having been kept in Stasis fields for five to ten years. Our opponent has found that releasing them into what is, for them, their near future, obliterates and confuses family and emotional connections.*

cap: *The young hellspawn are often confused and emotional, and respond to 'good' or 'noble' impulses as easily – or more easily – than they do to 'evil'. This tendency can be exploited by any experienced hunter.*

cap: *Secondly, and more importantly, the young hellspawn has learned nothing about the harnessing and control of its abilities – some of which, particularly those concerning transmutation and reality adjustment, it may never fully learn or control. It is a thing of raw, but unfocussed power, and an intelligent hunter can turn this to advantage.*

cap: *As Hellspawn get older they also get wiser and more ruthless. They also become much more careful of power expenditure, something with which young Spawn are rash and reckless.*

cap: *Thirdly, by destroying Hellspawn young, a hunter is performing a valuable service. Each Hellspawn is a potential officer in the army of Hell. The discovery and empowering of a Hellspawn takes much energy and time on the part of the Malebolgia: thus far it has not created more than one in 50 years, and usually not more than one a century.*

cap: *At the point where its power reservoir is exhausted the Earthbound Hellspawn return to the Ninth Level. At this point they face the Ordeal of the Dark Carcass. Those who pass become*

G00425



Spawns 9 – draft Script for Todd.
Page 2

officers in the Army of Hell. Those who fail become food for the soldiers of Hell. Either way, the power of the Malebolge has increased.

- cap: *Some older Hellspawn can become quite desperate when they realise what waits for them at the point of power depletion, and will go through quite remarkable efforts to avoid battle or any further depletion of energy.*
- cap: **Hunting Methods:**
- cap: *Only a hunter with plenty of time on her hands, a full arsenal, and a willingness to undergo a potentially lengthy period of hardship and discomfort should even consider hunting Hellspawn.*
- cap: *Hellspawn hunting is unlike other methods of Hunting.*
- cap: *Stalking a Hellspawn is advisable. Learn its habits. The Hellspawn when roused are rapid and tireless.*
- cap: *It is wise to Decoy a Spawn, by diverting its attention.*
- cap: *A first hard strike will often take a Spawn out.*
- cap: *Caution: in many young Hellspawn, the carapace is more wily and vicious than the occupant. This must always be guarded against.*
- cap: **WEAPONRY:** *A multitude of weapons can be used to weaken and goad the creature: needlebands, shiver-shivs, scarabands, stoners, mutilers, and morningstars, amongst others, according to the hunter's own preferences. (See part XIII "WEAPONRY", chapters 97-104)*
- cap: *However, the most important weapon, and that without which hunting Spawn is not only foolish, but pointless, and virtually suicidal, is the Lance.*
- cap: *The Hellspawn's Carapace sets up interference that will prevent the Lance from activating. It needs to be close in to the Hellspawn before being activated.*
- cap: *Once activated it sets up a dimensional resonance that will lance the Hellspawn from this level of existence like pus from a boil.*
- cap: *If the Carapace is left behind at this point, it will be in a weakened condition, and easily terminated.*
- cap: *Then all you need to do is take your trophy back, and bask in the praise and admiration of your fellow hunters.*

.....
SPAWN 9

"ANGELA"

Page 1

Spawn 9 – draft Script for Todd.
Page 3

It's 800 years ago, in the middle of a forest.

We start by looking at a beautiful woman. Her clothes are ripped and torn. She's scratched up. She was wearing something like a gown and peasant clothes. This is Angela, in disguise.

Angela: Mercy! Help me!

For the love of god, will no-one come? Will no-one save us?

Angela: Please... Help me...

Spawn rides up on a huge horse. He's wearing a kind of Spawn suit and mask, although the actual costume under the cloak is reminiscent of a suit of armour. His lettering is like the Spawn lettering, but maybe with a different colour in the border.

Page 2

spawn: Good day, sweet maiden. You are hurt.

Angela: I am hurt, my lord, but I am a maiden no longer.

Spawn: You need help.

Angela: It is not I who needs help, my lord, but my sister. The ogre who dealt with me thus has taken her back to his cave.

Great Lord, my sister is little more than a child...

(Spawn reaches down one arm, and sweeps her up onto his horse. We realise that he is huge – a really big man – and that she's a teeny thing in comparison).

Spawn: Where is this ogre?

Angela: Through the glen, there. In a cave under the waterfall.

Page 3

They ride on the horse in silence, through the woodland. They can be silhouetted against the sky as much as you like.

Angela: My lord – why do you cover your face?

Spawn: You would not wish to see my face, sweet maiden.

Your sister, you say...?

I also had a sister, beautiful and wise, whom I swore I would see married before I died.

Angela: And did you?

Spawn: I...went away, for many years. When I... returned, my sister was indeed married...

Spawn 9 – draft Script for Todd.
Page 4

Not to the man I would have chosen, alas.

If we knew the future, well, what then?

Page 4

Angela: You have not told me your name, my lord.

Spawn: I no longer have a name.

They've reached a waterfall, underneath which we can see a cave.

Angela: There! That is the cave, in which the ogre has my sister. My lord, he is most strong and fearsome...

Spawn: I also am most strong and fearsome. You shall wait here.

Page 5

Angela: I will come in with you. I know the secrets of the cavern, after all.

Spawn: Very well.

(they dismount. Enter the cave – walk under the waterfall.)

(In the cave: it's very dark.)

Angela: It is very dark.

Spawn raises his hand. It bursts into flame. Now they're lit, orange, almost silhouetted figures, walking through the darkness.

Angela: You are a wizard!

Spawn: No wizard, fair one. Once I was a man... a bad man... now... I know not what I am.

This cave... how much further must we go?

Angela: Oh, I think we've come far enough.

There's a glittery shimmering around her as she says this.

Page 6

Over the page and she's in full Battle armour, as on the cover of Spawn 9.

Spawn: What magic is this?

Angela: No magic, little hellspawn.

Spawn 9 - draft Script for Todd.
Page 5

Page 7

(Fighting. We see them fighting. He shoots power blasts. She rolls out of the way. Jabs him with she shivershiv.)

(The Spawn power readouts are in old-fashioned gothic lettering.)

Page 8

She winds up above him, with the big power lance in his face.

Spawn: What... what manner of creature are you?

Angela: What manner of creature? Oh, poor little Hellspawn. You have been hunted...

Now you'll never be a captain in the army of the Malebolgia.

You're one more little pawn who will never become a queen.

You're in the army. Haven't you ever wondered who you were meant to be fighting?

Poor Hellspawn. You aren't that bright, are you?

Spawn: I don't understand..

She's thrust the Lance into his face. Activates it by pressing a button on the side.

Spawn screams and screams and winds up a smoking mess.

Page 9

The costume-armour lays on the floor. The chains shoot up at her: She stabs it with the lance.

Costume: Aaaagh!

She reaches down and picks up the spawn tag. Fits it over her little spear thing, or holds it up, with pleasure, grinning.

Close in on Spawn logo image, and we end the sequence of 'Hunting Manual' captions, with the line: "Then all you need to do is take your trophy back, and bask in the praise and admiration of your fellow hunters."

Then we got a shot of Angela, walking through present-day Manhattan, spawn-logo earrings on her ears. She's wearing a present-day suit, and it's obviously now. She's got a purse or a bag over her shoulder.

.....

Page 10:

Over the page:

Spawn 9 – draft Script for Todd.
Page 6

The initial image is the one Dave faxed me, that he wants set up in his issue. It's in black and white – no colour on it: Spawn in the middle, with all the arms reaching out to him.

Pull back. We're looking at Spawn asleep in the back of the waste ground where the bums are. He's underneath an old car, or something: wherever he is, he's hidden, anyway.

A bum – someone who looks like an unshaven JFK might look, if he was around today, and in his seventies, and a wino – reaches down and shakes his shoulder.

Bum: Hey, Mister.

Spawn: Uhn...

Bum: Not a morning person, huh? I can dig it.

Just thought you'd want to know. The cops wuz around again this morning. They was askin' whether we'd seen some guy in a big cloak.

They got one-a them things. Y'know. Artist's rendition.

Not a bad one at that.

Page 11.

Spawn: What did you tell them?

Bum: Lessee. I said, I ain't seen nothing. Jimmy D, he said he hadn't seen nothing. Sherlock, he just belched and made like he was going to throw up.

An tricky Dicky, he tol' 'em he'd seen you alright, an for a dollar he'd tell 'em where. So they gave him a dollar, and he sez he sees you flying over the city every morning, in a giant pink cadillac, with a big green gorilla.

He told them he thinks you nest inna Chrysler building.

That Dicky, Whadda scream, huh? I tellya, if he ran again, I'd vote for him, Watergate or no Watergate.

Spawn: I'm grateful. Do you think they'll be back?

Bum: They'll keep coming back. We'll keep covering for you.

Spawn: Is there anything I can do for you in return?

Bum: After what the cops did to [name of the guy who was hit by the car]? What the mob did to Freddy? Stickin' it to any of them any way we can...

Hey. It's a pleasure.

Page 12

Spawn 9 – draft Script for Todd.
Page 7

There's a really old bum, a skinny, balding old man, with a grubby greyish-yellow beard, like a skinny santa claus. He calls himself Count Nicholas Cagliostro.

Cagliostro: Now, Jack-boy, don't you be so hasty. It ain't often we have an offer like that.

He takes Spawn by the arm.

Say... If you could create for us maybe a crate of Strawberry Ripple wine, I think we could consider all debts settled.

spawn: I'm not sure that I...

Cagliostro: You just have to close your eyes and concentrate, lad.

Spawn closes his eyes...

Cagliostro: Feel it deep inside yourself.

The Spawn Power Rating comes up between the panels.

Cagliostro: No... Not like that. You do it like that, you'll just lower your energy levels.

The trick is pulling energy from your costume. It's a neural parasite after all, but that doesn't mean you can't borrow a little energy from it in return...
And suddenly Spawn's holding a cardboard box full of bottles of wine.

Spawn: It worked!

Count: Sure it did.

Page 13

The Count reaches into the box, unscrews a bottle of ripple wine. Chugs it back.

Count: Hey. Y'know, some bums talk about Chateau Lafite, or Mouton Rothschild, or that fancy stuff.
But for my money nothin' compares to a good 1989 strawberry ripple.

Hey, kid. You're okay.

The other bums are sharing out the bottles.

One bum to another: Looky Elv. It says in the Weekly World News you just got married again.

Other bum who looks like an old Elvis: Not me, suh. Uh-uh.

Spawn: Yeah? Well, thank you, Mister...

Cagliostro: Count, Count Nicholas Cagliostro.

At your service, Mr Simmons...

Spawn 9 – draft Script for Todd.
Page 8

A beat. Then:

Spawn: What did you just call me?

...
Page 14

Cut to an office building, somewhere in mid-town. The kind of office building that DC always has its offices in. We're looking at a modern-day version of the same woman we saw in the opening pages. She's wearing a raincoat, with a fairly sensible suit underneath. Sh's carrying a large shopping bag. She's wearing a little spawn-symbol earring. She goes in to elevator bank. Up a huge elevator. She gets out at the top. It's a large reception space with a secretary in it. I think we might want to make the secretary a man.

Angela: Is Ms Gabrielle available?

Sec: Do you have an appointment?

Angela: I don't need an appointment. Just tell her that Angela's here to see her.

Secretary does something on the phone while Angela looks out the window.

Secretary: She says you should go straight in.

Page 15

Angela goes through the door, and finds herself in a huge, ballroom-sized room – it's two corners of a skyscraper floor – huge glass windows going from wall to wall, with a view out on New York. Waiting for her in the office – a huge room with, in one corner, a desk and a couple of chairs. Waiting in the room is another angel woman: Gabrielle. She's a little smaller than Angela, white hair, glasses. She looks slightly similar to Angela. She obviously doesn't like Gabrielle very much.

Gabrielle: Angela.

Angela: Hello, Gabrielle.

You're looking wonderful.

Gabrielle : I'm looking almost the same as the last time you saw me. When you described me as a pasty-faced, runty little desk-bound beurocrat obsessed with tiny details and with no prospects of promotion.

Angela: Did I say that?

Gabriell: Why, yes you did.

And now I'm the Director of Terran Affairs, and you're still a freelance.

They walk together over to the huge picture window. Look out over the expanse of New York: the skyline of New York stretches out below them.

Gabrielle: So. This whole world is my region of responsibility, since Raphaela was called upstairs.

Spawn 9 -- draft Script for Todd.
Page 9

Angela: I know.

Gabrielle: And I'm very busy. So if you think I'm letting you get out there and make my job any harder, you'd better think again.

Angela: Oh, but that's exactly what I am thinking.

Gabrielle stares up at her.

Gabrielle: This had better be good.

Angela opens her purse, holds up a piece of something magically glowing in front of Gabrielle.

Angela: It is. It's a hunting permit.

Page 16

Gabrielle: I see.

Put that away, Angela.

Hm. Yes, I'd heard that a new Hellspawn had surfaced. It's not exactly high on my list of priorities...

Okay. But none of that stalking and trailing nonsense.

I can't stop you from hunting. But I want this one quick and clean.

Cut to spawn. He's holding Cagliostro up with one arm.

Spawn: For the last time; I want to know how you knew I was Al Simmons.

Cagliostro: Jeez. You're a good kid, but you're really not very bright. You got a way to go.

I mean, I knew all about your costume. That didn't phase you.

So I know about the Malebolgia...

Spawn: The what?

Cagliostro: The guy you did the deal with. You know, "give me my wife back and I'll serve you for ever". That guy.

Page 17

Spawn: I see. So you know that I did a deal with the devil.

Cagliostro: You did a deal with the Devil, huh? You hadn't even stopped to think about which one?

Spawn 9 – draft Script for Todd.
Page 10

Spawn: Which one? There is only one. The Devil.

Cagliostro: You really don't get it.

Listen, kid, half the guys in this alley did a deal with a devil at some point.

Their devil gave them power and wealth and love and fame, everything they'd ever want. Then he collected, and they have to be bums in alleyways for the next however long.

Cagliostro: Look, sonny. There's a lot you don't understand about what's been happening to you...

Angela (off): Excuse me. Can we talk?

(This is Angela.)

page 18 to 20

(I've put in extra space here for lots of zapping and running around, Todd. You can take out a page or two if you want to. I'd suggest that you might want to have Angela shooting bolts of power – huge flashes of blue white light that Steve oliff can have fun with.)

Spawn: Huh?

Who are you?

Angela: Men call me Angela.

Spawn: Look, Angela, If you don't mind... I'm kind of busy right now. And I've got a lot on my mind.

Angela: I know. That's how I got this close.

She shimmers, and now she's in full battle-dress mode. She's holding a short spear, has a longer spear over her shoulder.

She shoots him with the short spear thing; a blast of power zaps out. Spawn throws himself out of the way.

SPAWN POWER READING at bottom page.

A little shooting and running about. Darts get flung, and Spawn seems reluctant to fight back. This is a lady, after all.

Spawn: Hey, lady. I don't want to hurt you.

Angela: I know. I don't want to hurt you either. I want to destroy you.

She shoots him, head on.

Page 21

E

Spawn 9 – draft Script for Todd.
Page 11

There's a zapping, and Spawn's costume flutters to the ground. It's as if he's been destroyed or vapourised and there's nothing left but the costume.

Angela looks triumphant. She lays down the long nasty giant can-opener staff.

She walks over to the costume – reaches down to the costume to pick up the mask.

Two hands – spawn's – shoot up from the costume. Remember the end of Carrie, when the hands shoot up from the grave and grab Amy Irving's leg? Well, it's like that, only, because she's bending over, one hand grabs her shoulder, the other grabs her around the neck.

Page 22

She's pulled down – actually into the costume.

Large panel: the spawn face, the rotting, scabby nasty spawn face is pressed close against hers, nose to nose. Slowly the rotten spawn face cracks into a smile.

The background is just blackness, or dark weird zipatone. We're in another dimension, in the world inside the costume – although Spawn doesn't know know that's what it is or that that's what he's done.

Spawn doesn't say anything. He just looks mean as hell. He's got one hand around her throat, and he's squeezing away.

She can't say anything. There's a hand around her neck after all.

Page 23

Angela (very very small lettering): Please, I can't...

She's going to die.

Angela (even smaller lettering – fading away): Please...

Angela's eyes begin to glow with light.

Back in the real world. The Spawn costume is on the ground. The hobos and bums are standing around, nervously, staring at it. Nearby is the big power lance.

Next panel: time for Steve Oliff to go to town. It's as if there's a wonderful twinkly silver explosion – as if a comet is coming out of the cape. Somewhere at the top of the comet is something transparent and vaguely Angela-shaped, fleeing in a great deal of pain.

Page 24

There's a fluttering. Spawn is standing there, filling the costume, and he's normal again.

The other bums begin to wander off, a few of them looking up into the sky.

Cagliostro stands next to him.

Spawn 9 - Draft Script for Todd.
Page 12

Cagliostro: Hey, Simmons, that was pretty impressive. You don't often see an angel take off like a bat outta hell! Heheheh...

Spawn: That was an angel? But she tried to kill me!

Cagliostro: Like I said, There's a lot you don't know.

Spawn: She dropped this.

He picks up the lance.

Cagliostro: Put that down. Don't touch it!

Spawn: But what is it? What does it do?

He's looking straight down at the end of the spear now.

Spawn: There's some kind of button on the side...

Cagliostro: I said don't-

Close-up: his thumb presses the button.

A bolt of power comes up at him, from the end of the staff.

The Spawn power reading just shows "-.-.-"

He disintegrates.

Page 25

Now there's nothing left where he was but some black smoke vanishing on the breeze..

Cagliostro turns to some of the other bums.

Cagliostro: Like I said, A good kid. Just not very bright.

Hey guys. I'm outta here.

Pity, Simmons showed potential. He coulda been The One...

The last of the smoke evaporates. Cagliostro shuffles off and the bums stand around

ENDS.

There you go. Between the rough comic I've sent, and this script, it should be pretty obvious what's meant to be going on.

Don't feel bound by the rough layouts on the comic - that's more to give you a sense of what's happening than it's meant to be a set of thumbnails for you.

Spawa 9 – draft Script for Todd.
Page 13

When you've done rough pencils, I'm happy to go over it again and tidy up any dialogue; and obviously let me know if there's any continuity problems you can see. It's your playground – I'm just in for afternoon on the swings.

Give me a ring if you've got any questions...

All the best as always,

Neil

G00438

07-30-1997 10:44AM FROM TODD McFARLANE PRODS. INC TO

PAUL P.01

July 15, 1997

Post-it® Fax Note	7671	Date 7-24-97
To	ALAN	From SHELIA
Cc/Dept.		Co.
Phone #		Phone #
Fax #		Fax #

Dear Todd -

this is to confirm the main points touched on in our conversation of July 15, 1997.

You agree that with regard to the character of Angela, her appearances, spin-offs, merchandising and foreign translations of Spawn 9 or the Angela mini-series, that you'll be using the figures we put together based on the DC deal. (I'll attach my letter to you following the Oakland meeting to this.)

That my rights in Cogitoso and Medieval Spawn as above will be exchanged for your share of Miracleman. However, you will make all payments up until the date of exchange for the use of the characters, based on the same figures as above.

You'll include whatever you have in the way of inventory or film for Miracleman, received from Eclipse in the bankruptcy buy-out.

The date of exchange will be that of the first accounting, currently planned for August 1st.

That there will be a \$5,000 'bonus' paid to me on the handover fee, essentially as an apology for having dragging this thing on so long.

That I send you a copy of the tape of our Oakland meeting.

That I have, exclusive of any other Angela projects I might do with the Todd McFarlane division of Image, the rights to do a one-off Angela comics project, and a one-off Medieval Spawn project, on each of which I would keep 100% of the revenue; that if these are team-up projects they could go to other comics companies, but if they exclusively feature the character in the title, I agreed to do them with Image (although not necessarily with you).

That you will make your best efforts to ensure that there is a 'created by Neil & Todd' credit for Angela in her appearances in other comics, or other media.

That you'll have a tape of the HBO Spawn episode with Angela in sent here.

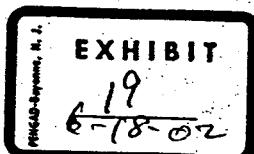
Can you review this, and confirm that this is what was agreed?

Yours sincerely (and very pleased to be in sight of wrapping all this up.)

Neil Gaiman
Neil Gaiman

PS: As a separate point, not sure that I quite made this clear, but Teri Cunningham at DC

TM 00358



EXHIBIT

350

07-30-1997 10:45AM FROM TODD MCFARLANE PRODS. INC TO

PAUL P.02

(2.)
explained that in the case where an animated TV show is adapted from an existing comic they pay a bonus to the author of the comic.

TM 00359

07-30-1997 10:54AM FROM TODD MCFARLANE PRODS. INC TO

PAUL P.01

TODD MCFARLANE
PRODUCTIONS

TODD MCFARLANE PRODUCTIONS, INC.
12280 SOUTH NOMAN LEE COURT
PHOENIX, AZ 85044 USA
TEL_602.598.8765
FAX_602.598.8766
<http://www.spawn.com>

July - 15 - 1997

MY DEAREST NEIL -

HAVING READ YOUR RATHER PROMPT RESPONSE TO MY
OFFER TODAY (RE: ANGELA, COG, MEDIEVAL SPAWN, MIRACLEMAN)

ALL I CAN SAY TO THE POINTS IS BEAUTY!

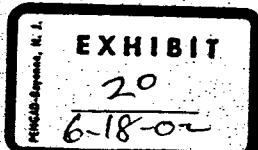
(THAT IS A CANADIAN TERM.)

IN PRESENCE TO CANADA UNFORTUNATELY DEDICATED THIS FROM BEING SOONER. FAMILY VACATION TIME.

BEFORE CONSUMMATING THIS MARRIAGE I JUST NEED CLARIFICATION
ON A FEW THINGS. 1) CAN WE EXCHANGE ON JULY 31 SO
AS TO BE AT THE END OF A MONTH FOR ACCOUNTING PURPOSES.
AND 2) IS THE CREATOR ROYALTY PRESENTED IN YOUR DC
OFFER USUALLY DIVIDED BY 3. SO THAT THE ARTIST ALSO SHARES
THIS PIECE?

ALSO, ACCOUNTING ON THE MEDIEVAL SPAWN WILL BE DONE
FROM A FORMULA YOU SAID DC COMICS USES ON SIMILAR
DERIVATIVE CHARACTERS. NOT THE STANDARD AGREEMENT
OF A NEW HERO. IS THIS ACCEPTABLE?

IF ALL THIS LOOKS FINE PLEASE FAX YOUR OKAY AND
I'LL MAKE THIS A PRIORITY TO FINISH. THANKS FOR YOUR
PATIENCE - TODDY ☺



TM 00362

EXHIBIT

351

TOTAL P.81

July 15 '97

Dear Todd -

Hurrah!

- ① Yes, we can exchange July 31st - but the exchange should be tied to the day of accounting (so if the accounting is delayed, so is the exchange).
- ② Nope - it's the writer creator royalty. (They do the same deal for the artist.) So that's the full amount.
- ③ Medieval Spain accounting - yes, I should have put that in. (I'd formula him at 50% of Angela.)

looking forward to getting done with
this -

Fra! la!

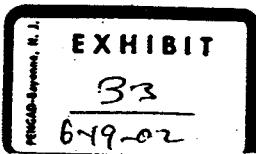
Not Snd —
—

TM 00360

16025988766 P.81

TO

00-15-1997 08:48PM FROM NEIL GUTHRIE



EXHIBIT

364